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No. 669

In the Supreme Court of the United States

OCTOBER TERM, 1960

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (R. 34) is not reported.

JURISDICTION

The order of the court of appeals was entered on September 23, 1960 (R. 34). A petition for a writ of certiorari was filed on October 21, 1960, and was granted on January 23, 1961 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, after appointing counsel (who submitted legal memoranda) and granting an appeal in forma pauperis to the extent of providing petitioner a trial transcript, was justified in

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denying this petitioner further leave to appeal in forma pauperis.

2. Whether the court of appeals should have considered as reviewable error, on an application for leave to proceed in forma pauperis, an allegation made for the first time in that court that it was unconstitutional for a judge who retired from the Court of Customs and Patent Appeals prior to 1958 to preside at petitioner's criminal trial in the District Court for the District of Columbia.

3. Whether a judge who retired from the Court of Customs and Patent Appeals prior to 1958 could constitutionally preside at petitioner's criminal trial in the District Court for the District of Columbia.

STATUTES INVOLVED

The forma pauperis statute, 28 U.S.C. 1915; the statute providing for the Court of Customs and Patent Appeals, 28 U.S.C. 211; the statute authorizing the assignment of retired judges, 28 U.S.C. 294; and the portion of the Payne-Aldrich Tariff Act of August 5, 1909, under which the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was created are to be found in Appendix A, *infra*, pp. 127–136.

STATEMENT

Petitioner was convicted of robbery in the United States District Court for the District of Columbia (R. 14, 18) and was sentenced to a prison term of not less than four years and nine months and not more than fourteen years and three months (R. 18). A motion filed in the district court for leave to

appeal in forma pauperis was denied "as plainly frivolous and not made in good faith" (R. 18). Petitioner then filed a petition in the Court of Appeals for the District of Columbia Circuit for leave to prosecute an appeal without prepayment of costs (R. 8–9). That court appointed counsel to represent petitioner and subsequently ordered that he be allowed to prosecute an appeal without prepayment of costs to the extent being supplied a transcript of the trial (R. 9, 12). Petitioner's counsel and the government submitted legal memoranda to the court of appeals (R. 13–33). On September 23, 1960, the court of appeals denied the petition (R. 34).

Petitioner attacks the denial of leave to proceed in forma pauperis and bases his claim upon the following circumstances:

1. ***Proceedings in the district court.***

Petitioner was charged with having robbed Charles C. Edgeworth of property valued at $58.31 on December 14, 1959 (R. 14). Edgeworth reported the robbery the night it occurred, but petitioner was not apprehended until January 26, 1960, when Edgeworth saw him on the street and pointed him out to police who arrested him (R. 15).

The government's case consisted of the testimony of a witness who was present at the time of the robbery but who was unable to identify petitioner; of the policemen to whom Edgeworth made his charges against petitioner; and of Edgeworth (R. 14–16).[1]

[1] A second man who participated in the robbery was never identified or apprehended.

Petitioner called no witnesses nor did he take the stand.

In his testimony, Edgeworth positively identified petitioner as one of the men who had robbed him (R. 2).[2] Counsel for the government then asked whether he had known petitioner prior to the date of the robbery, to which he replied that he had not known petitioner's name, but that he "knew his face" (R. 2). The following colloquy then took place (R. 2):

> Q. You had seen him before, correct?
> A. Yes, sir.
> Q. Where had you seen him?
> A. In Occoqu[a]n.[3]

Government counsel immediately moved to strike the answer (R. 2). It was stricken and direct examination was continued with no further reference to any prison association between the complaining witness and petitioner (R. 3).

On cross-examination, petitioner's counsel questioned Edgeworth about his identification of petitioner as one of the persons who had robbed him (R. 3). Edgeworth again said that, although he had not known petitioner's name, he had recognized him at the time of the robbery as a person he had seen before (R. 3). Counsel for petitioner then stated (R. 3):

---

[2] A post-arraignment report briefly summarizing the charge of the complaining witness and stating that the complaining witness knew petitioner "because he served a year in Jail with the Def." was filed in the district court but was not used at the trial (R. 13–14).

[3] Occoquan is a District of Columbia workhouse in Virginia, near the District of Columbia, but was not so identified during the trial.

I believe you mentioned that you knew this man at Occoqu[a]n; is that right?

Government counsel immediately interposed the statement that the answer to which petitioner's counsel referred had been stricken from the record, and the trial judge thereupon struck the question (R. 3). Counsel for petitioner responded that he believed that he had the right to ask where the prosecuting witness had known the accused (R. 3). The judge suggested that counsel ask instead where the witness had first seen petitioner (R. 3). Counsel then asked a series of questions about the occasions on which the witness had seen petitioner prior to the robbery (R. 3–5).

Edgeworth responded that he had first seen petitioner some four or five years before the robbery at a bar in the northwest section of Washington, D.C., where they were both having a beer (R. 3–4). He testified that he had seen petitioner on other occasions in northwest Washington, but that petitioner was neither a friend nor an acquaintance of his (R. 5). The questioning concluded with the following colloquy (R. 5):

Q. Now, you described each and every time that you have seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, you have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through——

The COURT. He told you yes, he saw him. Now pursue your question.

The WITNESS. Me and Benny done a year in Occoqu[a]n, that is why I knew him.

Q. What were you charged with?

A. Assault.

Q. You did a year in Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

After closing arguments, the court instructed the jury as follows (R. 6):

> The court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoqu[a]n.
>
> Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

At the close of the full charge the judge asked counsel if they were satisfied with the instructions, to which counsel for petitioner replied that he was "satisfied" (R. 7). The jury returned a verdict of guilty, and petitioner subsequently filed a motion for a new trial, which was denied (R. 18).

On April 28, 1960, petitioner filed, *pro se*,[4] a motion for leave to proceed on appeal in forma pauperis, and on May 4, 1960, the motion was denied by the trial court "as plainly frivolous and not made in good faith" (R. 8, 18).

---

[4] Appointed trial counsel was relieved, at his own request, on April 29, 1960 (R. 18).

All the foregoing proceedings were conducted by the Honorable Joseph R. Jackson, who had retired from the Court of Customs and Patent Appeals in 1952 (see 193 F. 2d xv, n. 5) and was sitting in the District Court for the District of Columbia under an assignment by the Chief Justice of the United States made pursuant to 28 U.S.C. 294(d).[5]

No question of the validity of Judge Jackson's assignment was raised during the trial.

2. *Proceedings in the court of appeals.*

On May 16, 1960, petitioner filed *pro se* in the Court of Appeals for the District of Columbia Circuit a petition for leave to prosecute an appeal without prepayment of costs (R. 8). He listed as reasons for his appeal the following points (R. 8–9):

> (1) denial of due process of law because of the appointment of incompetent counsel who failed to summon essential witnesses;
> (2) lack of probable cause for his arrest;
> (3) lack of positive identification;
> (4) denial of a fair and impartial trial; and
> (5) arrest on mere suspicion.

On May 18, the court of appeals appointed counsel to represent petitioner and file a memorandum in support of his petition (R. 9). On June 15, after examining the available court files and conferring

[5] The order of the Chief Justice of the United States assigning Judge Jackson to the United States District Court for the District of Columbia for the year 1960 is on file with the Clerk of the District Court, and it states that the assignment was made from the roster of available judges upon presentation of a certificate of necessity, as required by the statute governing assignment of retired judges to active duty, 28 U.S.C. 294(d).

with trial counsel and petitioner, appellate counsel filed a motion requesting a transcript at the expense of the government in order to determine whether the appeal was frivolous (R. 10–11). On July 8 the court ordered that "petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs" (R. 12).

On August 31, 1960, counsel filed a memorandum in support of the petition for leave to prosecute an appeal in forma pauperis (R. 13–29). The memorandum stated that counsel found no substance in the five points on which petitioner based his application but asserted that two substantial questions were "posed by the record" (R. 19). These two questions were (1) whether references at the trial to petitioner's past criminal record constituted plain reversible error, and (2) whether the trial judge was properly assigned to conduct the trial.

The memorandum asserted, in some detail (R. 20–25), that the reference to "petitioner's criminal record" was "reiterated on several occasions", prejudiced the jury, and deprived petitioner of a fair trial (R. 21–22). It was further asserted that the error was plain and substantial, and was not cured by the instructions to the jury (R. 22–25).

The memorandum also raised the question whether it was a violation of the Constitution for a judge who retired from the Court of Customs and Patent Appeals prior to the 1958 declaration by the Congress that that court was a constitutional court to be assigned to sit in the District Court for the Dis-

trict of Columbia pursuant to an appointment under 28 U.S.C. 294 (R. 26–28). The memorandum acknowledged that the appointment was validly made under the applicable statute, but questioned whether the Constitution authorized the Congress to provide for such appointments (R. 27–28).

The government filed an opposition to petitioner's memorandum in which it pointed out that no objections were made by petitioner at the trial to the allusions to the fact that the complaining witness had known petitioner in prison, and that most of the references to that fact were elicited during cross-examination by petitioner's counsel (R. 30). The government also pointed out that the 1958 declaration by the Congress that the Court of Customs and Patent Appeals was a constitutional court made Judge Jackson, who had retired from that court in 1952, a retired judge of a constitutional court and hence that there was no problem in this case of the assignment of a retired judge of a legislative court to sit in a constitutional court. The government asserted that assigned counsel's memorandum presented no questions requiring leave to appeal in forma pauperis (R. 31).

Petitioner's counsel filed a reply in which he asserted that the only matter to be determined by the court of appeals was whether the issues presented in petitioner's memorandum were so plainly frivolous that the appeal would be dismissed if the same issues were raised by a non-indigent litigant (R. 32–33).

A three-judge panel of the court of appeals, after considering the "memoranda in support and the op-

position," denied without opinion the petition for leave to proceed in forma pauperis (R. 34).

SUMMARY OF ARGUMENT

I

A. Petitioner was accorded, in the court of appeals, the rights granted by 28 U.S.C. 1915, as interpreted by this Court. The court of appeals furnished petitioner the assistance of counsel by the prompt appointment of a competent and conscientious attorney. A motion for a transcript at government expense was also granted. After evaluation of the transcript, counsel abandoned the allegations of error propounded in the original application, and filed a memorandum urging instead two new matters which he briefed at some length. He also filed a reply to the government's memorandum in opposition. Thus, petitioner had the benefit of representation by counsel who, in the role of an advocate, placed before the court of appeals and argued those matters which he believed warranted the granting of leave to appeal without prepayments of costs. A three-judge panel of the court of appeals passed upon the case. By the transcript and memoranda of the parties, it was able to evaluate fully the claims advanced by petitioner. The denial of further leave to proceed in forma pauperis was thus surrounded by the protections to which this court has held an indigent entitled under 28 U.S.C. 1915.

B. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction, the question of frivolity often comes before the court of appeals at two points. At the first stage,

after appointing counsel, the court of appeals must decide if there is sufficient indication that a question meriting review will be raised to justify a request for the grant of a transcript. At that point it is reasonable to require that the request be granted unless the frivolousness of the issue is clearly apparent from the face of the application. *Johnson* v. *United States,* 352 U.S. 565; *Farley* v. *United States,* 354 U.S. 521; *Ellis* v. *United States,* 356 U.S. 674. However, once counsel has been appointed, a transcript obtained, and the issues briefed, the question is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issues have been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have been sufficiently elucidated so that further review would unnecessarily consume the court's time. Petitioner has received as full review on the matters presented in counsel's memorandum as that to which a non-indigent would be entitled under the same circumstances. The sole element present in ordinary appellate proceedings which was here absent was oral argument, an omission which does not deprive petitioner of any constitutional right. *Price* v. *Johnston,* 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265. That this situation arises more frequently in this class of indigent appeals than in non-indigent appeals stems from the fact that in non-indigent

cases there is seldom the preliminary briefing and analysis necessary in indigent cases (of the present type) under 28 U.S.C. 1915. The non-indigent cases do not normally reach the appellate judges for consideration, as a court, until after oral argument. The same is true of indigent appeals in which the trial court grants leave to proceed in forma pauperis.

C. The issues raised by petitioner did not warrant further briefing and argument.

1. The allegation that there was reversible error resulting from the allusions to petitioner's imprisonment was, in light of the transcript, frivolous. Although the evidence was admissible since it went to the question of identity, government counsel, to whom the complaining witness' answer came as an obvious surprise, promptly moved to strike the answer. All other allusions to the fact that petitioner and the complaining witness had known each other at Occoquan (the District of Columbia workhouse) were made by petitioner's counsel in his behalf. In addition, defense counsel properly expressed himself as satisfied with the judge's instructions that the jury was to consider this testimony only as it related to the credibility of the complaining witness.

2. The court of appeals had no reason to require further argument on the authority of Judge Jackson to act.

a. The precise issue raised by petitioner in the court below was whether the Congressional declaration of 1958, in 28 U.S.C. 211, that the Court of Customs and Patent Appeals is a constitutional court, gave Judge Jackson, already a retired judge of that

court, the status of a retired judge of a constitutional court. No point was made as to the status of the Court of Customs and Patent Appeals or of its active judges after the 1958 enactment, or as to the power of Congress to declare the Court, in 1958, to be established under Article III of the Constitution. If, as petitioner assumed below, the Court of Customs and Patent Appeals became an Article III court in 1958 and its active judges became Article III judges, then Judge Jackson, as a retired judge, certainly became an Article III judge at the same time, along with the active judges. See *Booth* v. *United States,* 291 U.S. 339, 350–351.

b. Moreover, although the argument was not presented to it by the government, the court of appeals could well have deemed the issue before it precluded by the *de facto* principle, since admittedly Judge Jackson was assigned under the provisions of 28 U.S.C. 294(d) (App. A, *infra,* p. 129). It is well settled in all American jurisdictions in which the question has arisen (including the federal courts) that a judge appointed in due course under a subsisting statute to an existing judicial office is at least a judge *de facto* whose right to sit may not be questioned for the first time on appeal.

c. Third, regardless of whether the Court of Customs and Patent Appeals, as a court, is or was a legislative or an Article III court, Judge Jackson was competent to sit in petitioner's case because, at least since the 1958 Act, he has been an Article III judge. Judge Jackson has had a lifetime appointment and his duties are, and have been, judicial in nature. What-

ever else it may accomplish, the 1958 Act on the Court of Customs and Patent Appeals is properly read, at the very least, as a declaration by Congress that it was giving up whatever power it had to end the appointment of judges of that court or to reduce their salaries. If they were not previously judges competent to sit on an Article III court, they have become so as a result of that Act.

On any of these three grounds, the court of appeals could decide that it did not need further argument.[6] And on any one of them, the court could properly decide that this conviction should not be disturbed.

II

Petitioner's conviction should not be reversed merely because Judge Jackson presided at his trial. As indicated above, there are at least four separate reasons for the conclusion—three of which we shall discuss more fully in this Point.

A. The *office* which Judge Jackson held during the petitioner's trial—the office of District Judge of the District Court for the District of Columbia—is admittedly a lawful or *de jure* one. The designation of Judge Jackson by the Chief Justice of the United States to sit on the District Court was made under and in accordance with 28 U.S.C. 294. Pursuant to that designation, Judge Jackson, in good faith, filled the office of district judge and exercised the normal

[6] There is also a fourth ground for holding that Judge Jackson's participation in the trial was valid—*i.e.*, that the Court of Customs and Patent Appeals is and has always been a constitutional court—but we do not contend that, on that issue, the court below could properly have decided that further argument would be superfluous.

judicial functions incident thereto. Under these circumstances, Judge Jackson was, at the least, a *de facto* judge whose title to office and whose exercise of authority are not subject to challenge by the petitioner on appeal.

The rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least on appeal) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. *Ex parte Ward,* 173 U.S. 452; *McDowell* v. *United States,* 159 U.S. 596. This doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.

The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instituted by the sovereignty in whose name the judge is exercising judicial authority. Cf. *Ball* v. *United States,* 140 U.S. 118. In such a proceeding, the judge is formally made aware of the challenge to his title and is afforded an opportunity to defend his position. In the District of Columbia, that would be done under 16 D.C. Code 1601–1608 which provides that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute, either on their own motion or on the relation of a third party, a proceeding in *quo warranto* to try the title to hold office; or

should the Attorney General or the United States Attorney refuse or fail to act in the matter, a third party may institute similar proceedings by filing a verified petition in the District Court for the District of Columbia.

B. Our second contention is that, regardless of the status of the Court of Customs and Patent Appeals as a court, Judge Jackson is and has been, at least since 1958, an Article III judge fully competent to sit on the District Court for the District of Columbia. Judge Jackson has all the qualifications of an Article III judge. He has life tenure and performs judicial duties, at least primarily. The provision of the 1958 Act (part of 28 U.S.C. 211, App. A, *infra*, p. 128) that the Court of Customs and Patent Appeals "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court (including its retired judges). If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals.

No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such). On that tribunal, his duties would be primarily if not entirely judicial, and the issues with which he would be concerned would arise under the Con-

stitution and laws of the United States. Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. And Article III *judges* (as distinguished, perhaps, from Article III *courts*) may also validly perform certain non-judicial functions—as the course of our history proves. See *infra*, pp. 27–30.

Any claim that Article III and non-Article III functions cannot be mixed is certainly incorrect for the District of Columbia District Court—on which Judge Jackson has been sitting. It is clear that the judges of the Superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III and non-Article III functions. *O'Donoghue* v. *United States*, 289 U.S. 516; *Keller* v. *Potomac Electric Co.*, 261 U.S. 428. Under our view, the judges of the Court of Customs and Patent Appeals would remain Article III judges even if Congress abolished the court and ended or transferred its functions. See *Donegan* v. *Dyson*, 269 U.S. 49.

C. Thirdly, the Court of Customs and Patent Appeals was created by Congress as, and has always been, an Article III court.

1. It is significant that Congress, by the Act of August 25, 1958, has declared the Court of Customs and Patent Appeals to be a court which had been established under Article III of the Constitution.

(*a*). The language of the 1958 amendment shows that its purpose was not to *make* the Court of Cus-

toms and Patent Appeals an Article III court, but to declare that it was such a court—that it had been from its creation such a court.

(*b*). The legislative history of the measure confirms this purpose. In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. All three statutes must be read *in pari materia*. The committee reports accompanying the bills which eventuated in these measures, as well as the pertinent debates, clearly disclose the declaratory purpose of the enactments. For example, the House Judiciary Committee, in reporting out the bill to declare the Court of Claims to be a court established under Article III, stated that its purpose was to "declar[e] unequivocally" that the Court of Claims "was in fact established as, and continues to be, a constitutional court." A companion Senate bill was rejected because it was open to the interpretation that it "undertook to change the status of the Claims Court from a legislative court to a constitutional court." The legislative materials relating to the later bills show that it was the purpose of those bills to do for the Customs Court and the Court of Customs and Patent Appeals what the earlier bill had done with respect to the Court of Claims.

2. The Court of Customs and Patent Appeals was in fact created by Congress as an Article III court.

(*a*). The court's history shows that Congress so established it.

(*1*). The pertinent factors are these:

i. The court was created in 1909 to review the customs decisions of the Board of General Appraisers (now the Customs Court). A presiding judge and four associate judges, a court reporter, and the publication of the court's decisions were provided for. The terms of the Act establishing the court (pertaining to such matters as the appointment of a clerk and marshal, the court seal, writs, and allowable costs and fees) are strikingly similar to those of the Act which created the circuit courts of appeals, indisputably Article III courts.

ii. The President was given limited authority, at the request of the presiding judge, to designate circuit or district judges to sit temporarily in the event of vacancies or the temporary inability or disqualification of a judge or judges—a power later broadened and generalized, and transferred to the Chief Justice.

iii. As in the case of the Act which created the district and circuit courts and implemented the creation of this Court by defining the number of its judges and the number needed to constitute a quorum, no provision applicable to the tenure of the judges was included. It was assumed throughout the debates on the bill, and thereafter, that the judges would hold office during good behavior.

iv. The court was given "exclusive appellate jurisdiction" to review all final decisions of the Board of General Appraisers in cases respecting the classification of merchandise and rates of duty, including all appealable questions as to the jurisdiction of the Board and the laws and regulations governing the

collection of the customs. This jurisdiction had previously been exercised by the circuit courts, the circuit courts of appeals, and this Court. The debates in Congress, moreover, reflect with clarity Congress's awareness that the jurisdiction of the new court would be carved from jurisdiction previously exercised by the regular federal courts. Provision was also made for the transfer to the new court, for review, of cases pending in the circuit courts and circuit courts of appeals at the time of the Act's passage (including cases which had been decided by the circuit courts). As a consequence, many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred from the circuit courts and circuit courts of appeals, including many appeals from actual decisions of the circuit courts.

v. The $10,000 salary initially fixed for the judges of the court was reduced to $7,000 before the court was staffed. The latter figure was the salary then being received by circuit judges. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. The salaries established for judges of the Court of Customs Appeals have always been greater than those fixed for district judges.

vi. When the Judicial Code was enacted in 1911, the provisions pertaining to the Court of Customs Appeals were transferred to the Code, together with the provisions relating to the district courts, the circuit courts of appeals, the Court of Claims, the former Commerce Court, and this Court.

vii. In 1914, this Court was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Since 1930, this Court has had general certiorari jurisdiction with respect to customs cases from that court, and has exercised it.

viii. In 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the superior courts of the District of Columbia (subsequently held, in *O'Donoghue* v. *United States,* 289 U.S. 516, to be Article III courts). In 1958, this eligibility was broadened to include service on any court of appeals, any district court, the Court of Claims, and the Customs Court.

ix–x. Also in 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals on questions of law from findings of the Tariff Commission in proceedings relating to unfair practices in the import trade. And, in 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals.

(*2*). The conclusion to be drawn from the foregoing summary is that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal, with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts. Briefly recapitulated, the indicia of this intent are: (*i*) the federal and judicial nature of the subject matter (customs cases) originally commit l

to the court; (*ii*) the parallel between the language creating the court and that creating the circuit courts of appeals; (*iii*) the eligibility, from the beginning, of circuit and district judges to sit on the court; (*iv*) the life tenure of its judges from the beginning; (*v*) the fact that the court's jurisdiction was carved from the jurisdiction of the regular federal courts and that provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation (including cases which had been decided by the circuit courts, so that, as to such cases, the new court sat in review of the circuit courts); (*vi*) Congress's treatment of the court's judges from the beginning as on a par with circuit judges in matters of salary; (*vii*) the eligibility, since 1922, of its judges to sit on the superior courts of the District of Columbia—an eligibility since broadened to include service on any court of appeals or district court.

(*b*). We submit that *Ex parte Bakelite Corporation,* 279 U.S. 438—holding the Court of Customs Appeals to be a legislative court, created by Congress under its Article I power to lay and collect duties on imports, and deriving none of its authority from Article III—reached an erroneous conclusion from mistaken premises and failed adequately to take into account the pertinent historical materials.

(*1*). The basic premises of the *Bakelite* opinion were (a) that a court in which Congress vests jurisdiction which it is not required to vest in a court is necessarily a legislative tribunal, and (b) that Congress created the Court of Customs Appeals under Article I, not Article

III. In our view, both of these assumptions were mistaken.

(2). There is no principle requiring Congress to vest in Article III courts only those matters "which inherently or necessarily require judicial determination," and prohibiting it from requiring Article III judicial determination of matters capable of administrative settlement. There are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. The practice of many decades gives firm support to this principle. A substantial part of the business of the federal district courts consists of matters which Congress could clearly commit to executive or administrative determination but has chosen to bring within judicial cognizance, *e.g.*, money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and administrative agencies now have concurrent or coordinate jurisdiction.

None of the decisions cited in the *Bakelite* opinion to sustain its premise that only legislative courts can "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451) suggests that proposition. And in the most recent case discussing legislative tribunals (*National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582), each of the four opinions (expressing various views) rejected, ex-

plicitly or implicitly, the notion that Article III courts are barred from considering matters not "inherently or necessarily" *requiring* "judicial determination."

(*3*). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not Article III—is equally untenable. The history we have detailed above shows that Congress thought and assumed it was acting to create a special inferior court under Article III. The creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign to our history.

(*4*) Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration of Congress that it established the Court of Customs and Patent Appeals under Article III, ought now to be resolved in favor of the correctness of the congressional conclusion stated in that declaration—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court.

3. Finally, we submit that there is no constitutional obstacle to the conclusion that the Court of Customs and Patent Appeals was validly established by Congress under Article III.

(*a*). The customs jurisdiction of the court—its sole initial jurisdiction—has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party.

(1). *"Cases" and "controversies."*—The sole jurisdiction of the court at the time of its creation in 1909, and during the first thirteen years of its existence, was the hearing of appeals from final decisions of the Board of General Appraisers (now the Customs Court) in classification and rate-of-duty cases arising under the customs laws of the United States. Its judgments in such cases have always been final. There can be no doubt that this jurisdiction embraced, and embraces, "cases" within the meaning of Article III. This is confirmed by the fact that this jurisdiction was carved from authority previously exercised by the regular federal courts and that this Court, since it was first given the power in 1914, has many times reviewed customs judgments of that court.

(2). *"Arising under this Constitution, the Laws of the United States, and Treaties."*—There can also be no doubt that the "cases" with which the court deals in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—within the terms of Article III, Section 2. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, confirms it.

(3). *"Controversies to which the United States shall be a Party."*—At least the customs decisions of the court also fall within this category of cases and controversies defined in the second section of Article III. In *Williams* v. *United States*, 289 U.S. 553, 571–

580, this Court, overruling prior statements, construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. In *Pope* v. *United States*, 323 U.S. 1, the government urged that this interpretation was incorrect (but the Court found it unnecessary to reach that question). We adhere to that position. History shows no intention to withhold from the federal courts jurisdiction over claims *against* the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that, where such consent is given, a suit against the government is not a "controversy to which the United States shall be a party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Hamilton specifically recognized that a sovereign may be sued if it consents, and Madison and Marshall, in the Virginia debates on the Constitution, acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit as a controversy "between a State * * * and foreign States." There is no reason to believe that the parallel clause providing jurisdiction where the United States is a party had a narrower scope.

(*b*). The subsequent vesting in the Court of Customs Appeals of jurisdiction over matters which may

not constitute "cases" within Article III, Section 2, did not affect its Article III status.

(*1*). It was not until 1922, thirteen years after its creation, that the court was first vested with jurisdiction over a matter which may not involve the adjudication of a case or controversy within Article III, Section 2. This was the power, conferred by the Tariff Act of that year, to hear appeals from findings of the Tariff Commission, on questions of law, in proceedings relating to unfair practices in the import trade. Regardless of whether such appeals present justiciable cases, the conferring of such jurisdiction—which historically has represented a very small fraction of its total business—could not have affected the Article III character of the court if, as we have argued, it had that status previously. But, for the reasons we shall indicate, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(*2*). The court's patent and trade-mark jurisdiction was transferred to it in 1929 from the Court of Appeals of the District of Columbia. This jurisdiction was held to be non-judicial in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (decided prior to the transfer). But see *United States* v. *Duell*, 172 U.S. 576, an earlier decision (not referred to in the *Postum Cereal* case) which stressed the essentially judicial character of such jurisdiction, notwithstanding that the decision of the court aided an administrative body in making a determination committed to it by Congress. Moreover, the fact that a patent

which was issued following an appeal to the District of Columbia Court of Appeals was later challengeable in any court (the principal basis for this Court's conclusion as to the non-judicial character of the Court of Appeals' patent jurisdiction) would not appear to constitute a sound reason for that conclusion, since the same was true with respect to a patent issued pursuant to a proceeding in equity to secure the issuance of a patent—an alternative remedy of unquestionably judicial character.

(*3*). Even if one accepts the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction now exercised by the Court of Customs and Patent Appeals, the transfer to it of that jurisdiction was not inconsistent with its Article III status.

O'Donoghue v. *United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as an Article III tribunal. That decision, holding the superior courts of the District of Columbia to have been established under Article III, recognized the authority of Congress, under its plenary power to legislate for the District, to vest in the courts of the District, in addition to their Article III judicial functions, administrative and legislative powers. We submit that the rationale of the *O'Donoghue* case is equally applicable to the Court of Customs and Patent Appeals. That court has its headquarters at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to

the same authority which it exercises in conferring non-judicial powers on the courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, particularly since the court's patent and trade-mark jurisdiction did actually come directly from the District Court of Appeals.

In addition, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8—granting authority to legislate generally in the field of patents, trade-marks, and customs—s[illegible]ain the establishment of such non-judicial machinery. It is true that this Court and individual Justices have rejected, in general terms, the exercise by federal courts, other than the District of Columbia courts, of non-judicial functions. But the Court's concern for the nationwide federal court system suggests that there well may be a difference, with respect to joinder of non-judicial with judicial functions, between the regular federal courts and special constitutional tribunals. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment apply with less force to the specialized tribunals with their limited functions and areas of responsibility. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both the neces-

sary Article III powers and also certain "non-judicial" functions, especially if the latter are closely akin to judicial powers (as is the case with the so-called "non-judicial" jurisdiction of the Court of Customs and Patent Appeals).

ARGUMENT

I

THE DENIAL OF LEAVE TO PROCEED IN FORMA PAUPERIS MET THE REQUIREMENTS OF 28 U.S.C. 1915

The threshold question in this case is whether petitioner has received, in the court of appeals, the full benefit of the provisions of 28 U.S.C. 1915 for forma pauperis appeals (App. A, *infra*, pp. 127–128). We believe that petitioner has been given his rights under the general principles of Section 1915, as interpreted by this Court. He has had counsel assigned to him, a transcript made at government expense, the benefit of extended written argument by counsel, and adequate consideration by a three-judge panel of the issues raised. He is entitled to no more.

A. Petitioner's contentions, adequately presented by counsel on the basis of the trial record, were reviewed by a three-judge panel of the court of appeals.

1. *Petitioner had the benefit of counsel and of the trial record.*

The court of appeals furnished petitioner the assistance of counsel by the prompt appointment of a competent and conscientious attorney (R. 9). Counsel made a careful investigation of the points raised by petitioner in his *pro se* application, and concluded

that in order fully to protect petitioner's interests a transcript of the trial record would be required. A motion for the transcript was granted (R. 10–12).

After evaluation of the transcript, counsel abandoned the allegations of error propounded in the original application, and filed a memorandum urging instead two new matters only tangentially or inferentially related to those asserted in the first application (R. 19). He informed the court that such substance as there was in the specifications of error in the *pro se* application (*supra*, p. 7) was incorporated in the first question urged in the memorandum: that it was error to have allowed any reference to petitioner's prior imprisonment. The second question which counsel urged as requiring further review, that of the constitutionality of Judge Jackson's assignment to the district court, was a clear result of counsel's advocacy of petitioner's right to appellate review, since this question had not been raised below, nor did counsel find it to be implicit in any of the questions raised in the original petition.

Counsel briefed at some length the two issues he believed required appellate review (R. 13–29), the substance of which we shall consider later (*infra*, pp. 40–49). In addition, counsel filed a reply memorandum to the government's memorandum in opposition to the granting of the petition (R. 32–33).

Thus, as required by this Court, petitioner had the benefit of representation by counsel who, in the role of an advocate, placed before the court of appeals and argued those matters which he believed warranted the granting of leave to appeal without pre-

payment of costs. See *Ellis* v. *United States*, 356 U.S. 674; *Johnson* v. *United States*, 352 U.S. 565; *Johnson* v. *Zerbst*, 304 U.S. 458.

2. *A three-judge panel of the court of appeals considered petitioner's contentions.*

Since a transcript had been provided, both counsel and the court were enabled to determine whether the conduct of the trial had deprived petitioner of any rights. Counsel utilized the transcript to discover matters which petitioner failed to urge *pro se*, thereby providing petitioner with a scrupulous examination of any possible error which might entitle him to a reversal of the conviction. Those events upon which the claim of error was predicated were reproduced verbatim in counsel's memorandum (R. 16–18) and, in addition, the memorandum contained a summary of all of the testimony at petitioner's trial (R. 14–16).

The court which passed upon petitioner's appeal was a three-judge panel of the court of appeals. As we have indicated, that court had called to its attention all those matters upon which counsel's advocacy of the reversal of the judgment of conviction was based. The transcript and other materials, such as petitioner's memoranda and the government's opposition, enabled the court to evaluate fully the claims advanced by petitioner.[7] The denial of leave to proceed further in forma pauperis, based upon these mate-

[7] We are informed that even though, in the absence of the docketing of an appeal, the trial record is not formally before the court of appeals, in fact the entire jacket from the district court is sent to the court of appeals when a petition for leave to proceed in forma pauperis is filed in that court.

rials, was surrounded by all the protections to which this Court has held an indigent entitled under 28 U.S.C. 1915. See *Farley* v. *United States*, 354 U.S. 521; *Johnson* v. *United States*, 352 U.S. 565; cf. *Edwards* v. *United States*, 355 U.S. 36.

B. *A court of appeals need not grant leave to proceed further in forma pauperis once it is satisfied, on the basis of an adequate presentation of the appellant's contentions, that the issues raised do not warrant further briefing and argument.*

1. Where a district court has denied leave to appeal in forma pauperis on direct appeal from a conviction,[8] the question of frivolity often comes before the court of appeals at two points. At the first stage, after appointing counsel, the court of appeals must decide if there is sufficient indication that a question meriting review will be raised to justify a request for the grant of a transcript.[9] At that point, where the decision must to a large extent be made on the basis of potentialities, it is reasonable to construe the term "frivolous" liberally in favor of the defendant and to grant the request unless the frivolousness of the issues be clearly apparent from the face of the application. That is the teaching of

[8] The certificate of the trial court that petitioner's *pro se* application in that court for leave to proceed in forma pauperis was frivolous and not made in good faith is not here at issue, although its propriety is confirmed by the fact that counsel appointed by the court of appeals abandoned petitioner's *pro se* allegations of error because they were not supported by the record (R. 19).

[9] Proceedings of the kind here involved were characterized by the First Circuit as a "preliminary appeal". *O'Rourke* v. *United States*, 248 F. 2d 812, certiorari denied *sub nom. Doran* v. *United States*, 356 U.S. 922.

this Court's decisions in *Johnson* v. *United States*, 352 U.S. 565; *Farley* v. *United States*, 354 U.S. 521; and *Ellis* v. *United States*, 356 U.S. 674.

However, once counsel has been appointed, a transcript obtained, and the issues briefed (even though preliminarily), the court of appeals is confronted with a very different situation. In reality, the question then is—whatever terminology one employs—whether there is need for still further briefing and for oral argument. It is very similar to the question which confronts this Court when, having determined that certiorari should be granted or an appeal allowed, it decides whether the issue has been sufficiently clarified by the initial briefs to warrant summary determination without further argument on the merits. This is not an uncommon practice by this Court. See, *e.g.*; *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190; *Sims Motor Transportation Lines, Inc.* v. *United States*, 362 U.S. 637; *Wabash Railroad Co.* v. *Commercial Transport, Inc.*, 361 U.S. 1; *Beard* v. *Ohio*, 361 U.S. 4; *Womack* v. *Ohio*, 361 U.S. 5; *Smith* v. *United States*, 361 U.S. 13; *Harris* v. *Pennsylvania Rd. Co.*, 361 U.S. 15; *United States* v. *Haley*, 358 U.S. 644; *United States* v. *Lane Motor Company*, 344 U.S. 630.[10] At this stage, the court of appeals, like this Court, is justified in denying further argument when in its opinion the issues presented have

[10] Rule 16(1)(e) of this Court's Rules provides that the Court "will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

been sufficiently elucidated so that further review would unnecessarily consume the court's time.[11] Where, as here, there has been extensive briefing which reveals the insubstantiality of the claims of error or the lack of a justiciable question, there is no reason to require additional review by the court through formally docketing the appeal, receiving further briefs, and hearing oral argument.[12]

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[11] In arguing that the court of appeals below has attempted to avoid the standards fixed by this Court, petitioner and counsel *amicus curiae* cite a number of cases in which this Court has summarily reversed denials by that court of leave to proceed in forma pauperis. Most of these cases, however, were decided by the court of appeals prior to this Court's particularized enunciation of standards in *Ellis* v. *United States*, 356 U.S. 674, and therefore cannot substantiate an assertion of attempts to circumvent that holding. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578. In *McAbee* v. *United States*, 361 U.S. 537, counsel had not been appointed and the Solicitor General did not oppose remanding the case for the appointment of counsel and the determination of certain issues which had not been considered by the court of appeals. In *Smith* v. *United States*, 358 U.S. 281, there was an issue as to whether assigned counsel, who had been trial counsel, acted as an advocate in the court of appeals (see Brief in Opposition, 192 Misc., O.T. 1958). Thus, only *Smith* v. *United States*, 361 U.S. 38, can be said to be a decision since *Ellis* which represents an overruling of the decision of the court of appeals that further review was not warranted, and in that case there was disagreement on the question within the circuit.

[12] This Court has declined to review cases from other circuits denying leave to appeal in forma pauperis where the court of appeals has, as here, examined a question which could not be said to be *per se* frivolous on its face, but which was found to be so in the context of the proposed appeal. See, *e.g.*, *United States* v. *Visconti*, 261 F. 2d 215 (C.A. 2), certiorari denied, 359 U.S. 954; *Weber* v. *United States*, 256 F. 2d 119.

2. The historic concern for the rights of indigents in the courts of law, in both civil and criminal matters, has been to insure that the fact of indigency does not deprive the party of his full measure of justice. This principle has rightly moved Congress and this Court to provide the protections we have discussed. But it has also been a matter of concern that those remedies which mitigate the rigors of poverty do not also open the floodgates to frivolous and unsubstantial proceedings. See Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940 (1940). The Congress, in allowing appeals in forma pauperis, included the express provision that such appeals would not be granted if in bad faith or frivolous. See 45 Cong. Rec. 1532–1534, 1767 (1910); see also *Wells* v. *United States*, 318 U.S. 257. Unless the screening process provided by Congress is to be limited solely to those questions which, from their mere statement, are seen as devoid of all merit as a matter of law or of immediately apparent fact, a court of appeals which has had issues presented to it preliminarily—on the record and with briefs of counsel—may properly decline to permit further proceedings in forma pauperis when it decides that further briefing and argument are unnecessary.

For instance, although it might not be apparent, absent the transcript, that there was sufficient evidence to sustain the verdict or that the trial judge

(C.A. 8), rehearing denied, 257 F. 2d 585, certiorari denied, 358 U.S. 912; *O'Rourke* v. *United States*, 248 F. 2d 812 (C.A. 1), certiorari denied *sub nom. Devoán* v. *United States*, 356 U.S. 922.

gave a proper charge on some contested issue, the record of the trial (coupled with counsel's presentation of his points) might well make it manifest that the defendant had no case. In such an event, we do not believe that the appellate court would be compelled to set the case down for argument, receive and consider further briefs, and delay appellate disposition for no substantial end. Similarly, if the opposing positions on some issue of law are sufficiently set forth so that the court feels ready and able to reject the defendant's contention without further argument, there is no need and no point to permitting further proceedings. In all cases, the significant question is whether the appellate court has had the opportunity to evaluate the defendant's case on the basis of all the materials it properly needs. Once it has obtained all those materials and has determined that nothing further is necessary to help it decide, it is not required to let the defendant proceed further.

3. As we show below (*infra*, pp. 40–49), we believe that, on the questions enunciated in the memorandum of petitioner's counsel in the light of this record, a non-indigent's appeal would have been subject to dismissal or summary affirmance (see, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106; *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4); *United States* v. *Esters*, 161 F. Supp. 203 (W.D. Ark.)). Petitioner has received as full a review on the matters presented in counsel's memorandum as a non-indigent would be entitled to receive under the same circumstances. His poverty has not prevented appellate determination of this case on an

adequate record and after adequate presentation. Cf. *Eskridge* v. *Washington State Board of Prison Terms and Pardons*, 357 U.S. 214, 216; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, Nos. 174, 177, this Term, decided April 17, 1961. The sole element usually present in ordinary appellate proceedings which was here absent was oral argument, an omission which does not deprive petitioner of any constitutional right.[13] *Prince* v. *Johnston*, 334 U.S. 266; *Federal Communications Commission* v. *WJR, the Goodwill Station*, 337 U.S. 265.

Petitioner attempts to draw invidious comparisons between the treatment by the court below of this class of indigent appeals and non-indigent appeals, because so few non-indigent appeals are dismissed or summarily affirmed without oral argument.[14] This overlooks the cardinal fact that in non-indigent appeals (as well as in indigent appeals in which the trial court grants leave to proceed) there is seldom preliminary briefing and analysis, as is necessary (under 28 U.S.C. 1915) in this class of indigent cases in which the appellate court must decide

[13] Rule 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides that oral argument may be waived if counsel chooses and that the court may terminate oral argument if the court feels such argument is not necessary. Rule 31(a) of the court's Rule provides that there will be no oral argument on motions.

As indicated above (p. 34), it is not uncommon for this Court to dispense with oral argument.

[14] It should be emphasized that many forma pauperis appeals (those in which the district court grants leave to proceed) proceed in ordinary course. The problem of this case involves only those indigent appeals which the district court has found frivolous and in which the defendant then applies to the court of appeals. And even in that class the courts of appeals often grant leave to proceed at the outset.

whether to allow the defendant to proceed in forma pauperis. In the other groups of cases, the matter is not normally called to the judges' attention until after all the briefs on the merits have been filed and distributed;[15] even then, no formal action by the court is called for until after argument, and there is no routine procedure by which the court decides for itself whether oral argument is unnecessary. Accordingly, once the briefs are submitted, it is usually as expeditious to proceed to the oral hearing. See *Young* v. *United States*, 267 F. 2d 692, 693 (C.A.D.C.). But the review actually granted the appellant in such a case is, in reality, no greater.

It is true that the government has not often moved to dismiss non-indigent appeals or for summary affirmance[16]—because it is usually easier and just as quick to proceed in normal course, rather than to file an unusual motion to dismiss—but the fact that the government fails to take such appropriate action with respect to non-indigents does not mean that an indigent is prejudiced when appropriate action is taken as to him. As this Court said in another context, a problem may be dealt with "* * * where it is seen, without providing for others which are not so

[15] Unlike this Court, the courts of appeals, whose jurisdiction is almost wholly obligatory, do not ordinarily have to decide whether to take or hear a case, and accordingly do not have the equivalent of this Court's conferences at which certiorari is granted or denied, probable jurisdiction noted, or the decision below affirmed summarily.

[16] Rule 39(a), F.R. Crim. P., provides that the "appellate court may at any time entertain a motion to dismiss the appeal, * * *", and courts of appeals likewise entertain, on occasion, motions for summary affirmance.

evident or so urgent". *Hirabayashi* v. *United States*, 320 U.S. 81, 100. This is especially so in the District of Columbia, where the courts must deal, as in the states, with the prosecution of the ordinary local types of crimes and where the workload of the court of appeals is increased by the filing of approximately one forma pauperis application per working day of each term. See *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.), dissent by Prettyman, C.J.; cf. *Young* v. *United States*, 267 F. 2d 692, 695 (C.A.D.C.); *Jones* v. *United States*, 266 F. 2d 924, 926 (C.A.D.C.). In this class of forma pauperis cases,[17] there does exist perforce a standing mechanism, under the statute, for culling the particular litigations which should be stopped short of oral argument. Its continued and careful use does not represent any denial of equal justice, just because no similar standing mechanism exists for non-indigent cases or for indigents granted leave to appeal in forma pauperis by the trial court.

C. *The issues raised by petitioner did not warrant further briefing and argument.*

1. *The allegation that there was reversible error resulting from the allusions to petitioner's imprisonment was, in the light of the transcript, frivolous.*

a. The transcript shows that the initial reference to the fact that the complaining witness had known petitioner in prison came as a surprise to the government counsel.[18] Before any response could be made

[17] See footnote 14, *supra*, p. 38.

[18] Petitioner contends that government counsel knew that the witness would so testify because the post-arraignment report showing that the witness had known petitioner in the workhouse was "presumably" in counsel's hands or "at least available to him" (R. 20). Aside from this speculation, petitioner does not claim, nor is there any indication, that either govern-

by either petitioner's attorney or the court, counsel for the government moved to strike the answer, saying that he "didn't realize that was the case" (R. 2). The spontaneity of this response by government counsel confirms his claim of surprise, and the witness' response on cross-examination that he had first seen petitioner in Washington, D.C., makes it logical to suppose that this is the answer the prosecutor expected (R. 3–4). Any possible imputation of bad motive on the part of government counsel is negatived by the fact that no further allusions to petitioner's imprisonment were made on direct examination. When defense counsel first asked a question referring to petitioner's imprisonment, government counsel voluntarily informed the court that the prior answer referring to the imprisonment had been stricken from the record (R. 3). The granting of the prompt motion to strike was sufficient to cure any error which might conceivably have resulted from the reference to the Occoquan workhouse. See *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *Curzio*, 179 F. 2d 380 (C.A. 3); *Kinser* v. *United States*, 231 Fed. 856 (C.A. 8).

b. Even if the motion to strike the answer of the complaining witness referring to Occoquan had not been made and granted, petitioner would have had no grounds for reversal of the conviction. It is an elementary legal principle that evidence of prior criminal acts or imprisonment is admissible, in the discretion

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ment counsel or the witness used the report at any time during the trial.

of the trial judge, where such evidence is relevant to show the identity of the defendant as the person who perpetrated the crime charged. See Wigmore, *Evidence* (3d ed. 1940) § 215; McCormick, *Evidence*, (1954) § 157. Here, the only person who could identify petitioner was the complaining witness.

In *Bram* v. *United States*, 226 F. 2d 858 (C.A. 8), the accomplice of a bank robber was permitted to testify that he had first met the defendant in a reformatory in which they were both serving sentences, and a police department description of the defendant was admitted into evidence. The court said, in affirming the conviction (at p. 863):

> But the law is settled beyond discussion that the rule requiring the exclusion of evidence offered to prove that defendant has committed other offenses than the one charged does not apply to evidence which is relevant and competent to prove the charge against the defendant of which he is being tried. * * *
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> * * * * *
>
> Also, the admittedly accurate description of defendant produced by the police department was clearly relevant to the inquiry as to his identity with the bank robber. That the occasion for making the record was "in connection with an arrest or detention" was also merely incidental.

See, also, *Handy* v. *United States*, 199 F. 2d 704, 706–707 (C.A. 8); *Bracey* v. *United States*, 142 F. 2d 85, 88 (C.A.D.C.), certiorari denied, 322 U.S. 762; *Green* v. *United States*, 176 F. 2d 541 (C.A. 1).

In addition, the reference on direct examination to

petitioner's imprisonment was inferential, rather than direct, since the witness stated only that he had known petitioner at Occoquan. It does not necessarily follow, absent further identification of Occoquan as a prison or the nature of the petitioner's presence there, that the jury would have understood from the name of the place alone that petitioner had been imprisoned for the commission of a crime. It was not shown, on the direct examination, that either the witness or the petitioner had been a prisoner at Occoquan. From that evidence, the jury could have believed (if they knew Occoquan was a prison) that both the witness and petitioner were employees or visitors at the time of their meeting.

All other allusions to the fact that petitioner and the complaining witness had known each other at Occoquan workhouse were made by petitioner's counsel in his behalf, and therefore provide no basis for a claim of error. Defense counsel, in a justifiable effort to impeach the testimony of the complaining witness by testing his familiarity with the petitioner and attacking his credibility by showing that he had a criminal record, adduced again on cross-examination the fact that the witness had known petitioner at Occoquan (R. 3–5). That impeachment was the conscious purpose pursued by trial defense counsel is confirmed by his statement in the closing argument (R. 6):

> These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? *We have a witness who himself is a convicted criminal.* [Emphasis added.]

Petitioner cannot claim error in that which he induces and treats as favorable to himself. See *United States* v. *Apuzzo*, 245 F. 2d 416, 421–422 (C.A. 2), certiorari denied, 355 U.S. 831; see also *Benson* v. *United States*, 146 U.S. 325, 333.

d. Moreover, defense counsel properly expressed himself as satisfied with the judge's instruction that the jury was to consider the testimony as to Occoquan only as it related to the credibility of Edgeworth, the complaining witness. See *supra*, p. 6. It would in any event be too late to assert on appeal that the instruction was inadequate (Rule 30, F.R. Crim. P.; see also, *e.g.*, *Johnson* v. *United States*, 318 U.S. 189, 200–201; *United States* v. *Dornblut*, 261 F. 2d 949, 951 (C.A. 2), certiorari denied, 360 U.S. 912; *McKenna* v. *United States*, 232 F. 2d 431 (C.A. 8)), but we also think it clear that the judge's charge adequately dealt with the situation. It must be presumed that the jury followed the instruction. *Delli Paoli* v. *United States*, 352 U.S. 232.

e. Petitioner argues that he is not bound by the trial tactics of counsel because counsel was appointed and not retained (R. 22). But the fact that counsel was appointed is irrelevant for present purposes. Where, as here, there is no indication of egregious mistake or *mala fides* on the part of trial counsel, the established rules of appellate review must apply to the relationship between counsel and client without regard to whether counsel is appointed or retained. Assigned counsel may properly be held to as strict standards as retained counsel but should not be open to criticism which could not properly be addressed

to the latter. Petitioner has abandoned his claim that he was represented at the trial by incompetent counsel and therefore on appeal can no more challenge the chosen tactics of appointed trial counsel than he could those of retained counsel. See *Kelton* v. *United States*, 170 F. 2d 153 (C.A.D.C.), certiorari denied, 335 U.S. 831.

2. *The court of appeals had no reason to require further argument on the authority of Judge Jackson to act.*

The precise issue raised by petitioner in the court below was whether the Congressional declaration of 1958, in 28 U.S.C. 211 (App. A, *infra*, p. 128), that the Court of Customs and Patent Appeals is a constitutional court gave Judge Jackson, already a retired judge of that court,[19] the status of a retired judge of a constitutional court (R. 26, 27). No point was made as to the status of the Court of Customs and Patent Appeals or of its active judges after the 1958 enactment, or as to the power of Congress to declare the court, in 1958, to be established under Article III of the Constitution. Petitioner limited himself to the narrower claim that, since Judge Jackson had retired before 1958, he could be considered no more than a judge of a legislative court (which petitioner asserts was the court's status before 1958) and therefore unable to sit on the District Court for the District of Columbia, despite the assignment statute.[20] To this contention there are several separate

[19] He had retired in 1952.

[20] In the words of petitioner's memorandum to the court below (R. 26): "The 1958 amendment can neither add to nor de-

answers, some of more restricted scope than others.

a. If, as petitioner assumed below, the Court of Customs and Patent Appeals became an Article III court in 1958 and its active judges became Article III judges, then Judge Jackson, as a retired judge, became an Article III judge at the same time, along with the active judges. In this respect, his status is precisely the same as if he were still active and the same as the judges active in 1958. Judge Jackson is still a judge appointed to the Court of Customs and Patent Appeals; he did not receive a new office when he retired in 1952 and he does not hold one now. As this Court said in *Booth* v. *United States*, 291 U.S. 339, at 350–351:

> By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service. * * *. * * * The Act does not and, indeed, could not, endue him with a new office, different from, but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it * * *.

See also *Donegan* v. *Dyson*, 269 U.S. 49; *Boomhower, Inc.* v. *American Automobile Insurance Co.*, 220 F. 2d 488, 490–491 (C.A.D.C.), certiorari denied, 350 U.S. 833; *United States* v. *Moore*, 101 F. 2d 56, 59 (C.A. 2), certiorari denied, 306 U.S. 664.

b. Moreover, although the argument was not presented to it by the government, the court of appeals

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tract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later".

could well have deemed the issue before it precluded by the *de facto* principle, since admittedly Judge Jackson was assigned under the provisions of 28 U.S.C. 294(d) (App. A, *infra*, p. 129). It is well settled in all American jurisdictions in which the question has arisen (including the federal courts) that a judge appointed in due course under a subsisting statute to an existing judicial office is at least a judge *de facto* whose right to sit may not be questioned for the first time on appeal. This Court said, in *McDowell* v. *United States*, 159 U.S. 596, 601–602:

> * * * the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

See also *Ball* v. *United States*, 140 U.S. 118, 128–129; *Norton* v. *Shelby County*, 118 U.S. 425, 445. See, for further discussion, *infra*, pp. 50–59.

c. Third, regardless of whether the Court of Customs and Patent Appeals, as a court, is or was a legislative or an Article III court, Judge Jackson was competent to sit in petitioner's case because, at least since the 1958 Act, he has been an Article III *judge*. We may assume that defendants in criminal cases in the District Court for the District of Columbia are entitled to be tried before Article III judges. But what this means is that the judge has life tenure, that his pay cannot be reduced, and that he performs judicial functions.[21] A judge with these qualifications is not

[21] Article III, Section 1, of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall

precluded from sitting in a constitutional court, and does not lose his Article III status, because he may also perform duties in a legislative court. Certainly, this is true of the District of Columbia courts, which may exercise non-Article III functions. *O'Donoghue* v. *United States,* 289 U.S. 516.

Judge Jackson has had a lifetime appointment and his duties are and have been primarily judicial in nature. With respect to his Article III status, the only question, then, is as to the power of Congress to terminate his office or to reduce his compensation. Whatever else it may have done, the 1958 Act on the Court of Customs and Patent Appeals is properly read, at the very least, as a declaration by Congress that it was giving up whatever power it had to end the appointments of the judges of that court or to reduce their salaries—*i.e.,* that if they were not previously judges competent to sit on an Article III court, they have become so as a result of that Act. As with the old Commerce Court (see *infra,* p. 89, fn. 56), the Court of Customs and Patent Appeals may be abolished and its functions distributed elsewhere, but the tenure of the judges will continue unaffected. It follows that, at the time of petitioner's trial, Judge Jackson had all the qualifications required for a judge presiding over an Article III court—regardless of the status of the Court of Customs and Patent Appeals as a court. (For further discussion, see *infra,* pp. 59–64).

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hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

d. Finally, the Court of Customs and Patent Appeals can be deemed an Article III court and its judges Article III judges, both before and after the 1958 Act. See the discussion, *infra*, pp. 64–125. On that view (a position which requires the reconsideration of *Ex parte Bakelite Corporation*, 279 U.S. 438), Judge Jackson was, of course, competent to sit.

On any of these separate grounds, the petitioner's appeal to the court below would fail. The court below could properly deem at least the first three of them to require no further briefing or argument. Particularly in the light of the narrow issue presented by petitioner to that court (*supra*, p. 45) could it decide that it did not need more help to rule that his conviction should not be disturbed.

However, the general question of Judge Jackson's competency to sit on the District Court for the District of Columbia is now before this Court. That issue is present in a number of other cases pending in the courts below, and has a bearing on the competency of the judges of the Court of Claims and of the Customs Court to sit in regular federal courts throughout the country. Petitioner has briefed the question in detail. Accordingly, we shall also do so—in the subsequent portions of this brief—with the thought that the Court may well wish to pass directly upon the problem, so as to settle authoritatively a matter which has now become troublesome and needs resolution.

II

PETITIONER'S CONVICTION SHOULD NOT BE REVERSED BECAUSE JUDGE JACKSON PRESIDED AT HIS TRIAL

We have outlined in Point I (*supra*, pp. 30–49) four reasons why petitioner's conviction should not be reversed because Judge Jackson presided at his trial. In this Point, we discuss three of those reasons more at length:[22] (1) Judge Jackson was at least a *de facto* judge whose authority cannot be challenged on appeal; (2) Judge Jackson is an Article III judge, whatever is or has been the character of the Court of Customs and Patent Appeals; and (3) the Court of Customs and Patent Appeals has always been an Article III court.

A. *Judge Jackson was at least a* de facto *judge of the district court, and petitioner cannot on appeal challenge his authority.*

There can be no question that the *office* which Judge Jackson held during petitioner's trial (and which he is currently holding)—the office of District Judge of the District Court for the District of Columbia—is a lawful or *de jure* one. Admittedly, the assignment of Judge Jackson—a judge with life tenure—is authorized by a law of Congress, 28 U.S.C. 294 (App. A, *infra*, pp. 128–129). Judge Jackson's designation by the Chief Justice of the United States to sit on the District Court was made under and in accordance with that Act of Congress.[23] Judge Jack-

[22] In our view, no further argument is necessary on the first of the four arguments suggested above (*supra*, p. 46) for sustaining petitioner's conviction (with respect to the issue of Judge Jackson's participation).

[23] There is no challenge to the regularity of the designation.

son, in good faith, filled that office and exercised the normal judicial functions incident thereto. Under these circumstances, Judge Jackson was, at the least, a *de facto* judge whose title to office is not subject to challenge by the petitioner on appeal.

1. The rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession of and discharging the duties of a *de jure* office, a party litigant has no standing to challenge the title of a judge to hold office or the exercise by the judge of judicial authority, whether the judge is regularly or temporarily filling the office. *Ex parte Ward*, 173 U.S. 452, 454; *McDowell* v. *United States*, 159 U.S. 596, 601–602; *Ball* v. *United States*, 140 U.S. 118, 128–129; *Leary* v. *United States*, 268 F. 2d 623, 627 (C.A. 9); *United States* v. *Marachowsky*, 213 F. 2d 235, 245 (C.A. 7), certiorari denied, 348 U.S. 826. See *Johnson* v. *Manhattan Ry. Co.*, 61 F. 2d 934, 938 (C.A. 2).[24]

In *McDowell* v. *United States, supra*, 159 U.S. at 601–602, in answer to the defendant's contention, in a criminal case, that the Circuit Judge lacked the authority to appoint District Judge Seymour from

[24] In *Donegan* v. *Dyson*, 269 U.S. 49, the Chief Justice of the United States, pursuant to statute, designated Judge Mack, formerly of the Commerce Court, to sit in the District Court for the Southern District of Florida. The petitioner, in that case, was subsequently convicted on a criminal charge in the district court, the trial of which was presided over by Judge Mack. This Court, in sustaining the authority of Judge Mack, held that his designation was proper under the statute, and that, therefore, it was unnecessary to consider whether he was a *de facto* judge. *Id.* at 54.

another district to fill a vacancy in the district of trial, this Court ruled:

> Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face; and the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

In *Ex parte Ward, supra,* 173 U.S. 452, a convicted defendant challenged by habeas corpus the jurisdiction of the presiding judge to discharge judicial functions since he had not been at the time confirmed by the Senate. While the holding of the Court was that the question could not be raised on habeas corpus, the Court's reference to its prior *McDowell* decision indicates that it deemed the *de facto* doctrine applicable even if raised on direct attack. See *Ball* v. *United States,* 140 U.S. at 128–129.

The *de facto* doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, and delay which would result from challenges to the authority of public officers.[25] As this Court put it in *Norton* v. *Shelby County, supra,* 118 U.S. at 441–442:

> The doctrine which gives validity to acts of officers *de facto* * * * is founded upon considerations of policy and necessity, for the protection of the public and individuals whose inter-

[25] See also *Commonwealth* v. *Di Stasio,* 297 Mass. 347, 351, certiorari denied, 302 U.S. 683; *Sylvia Lake Co.* v. *Northern Ore Co.,* 242 N.Y. 144, 147–148, certiorari denied, 273 U.S. 695.

ests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.

2. The principle that the authority of a judge acting in good faith under color of authority as a "regular" or "permanent" judge is not open to challenge is recognized by all American jurisdictions.[28]

[28] *E.g.*, *Spradling Thomas* v. *State*, 17 Ala. 440, 446; *Humel* v. *Hoogendorn*, 5 Alaska 25, 27; *Logan* v. *Harris*, 213 Ark. 37, 39–40; *People* v. *Sassovich*, 29 Cal. 480, 485; *Gorman* v. *People*, 17 Colo. 596, 597 (dicta); *State* v. *Carroll*, 38 Conn. 449, 464–472; *Territory* v. *Mattoon*, 21 Haw. 672, 674–675; *State* v. *Malcom*, 39 Ida. 185, 193 (dicta); *People ex rel. Ballou* v. *Bangs*, 24 Ill. 184, 186–187 (dicta); *Rogers* v. *Beauchamp*, 102 Ind. 33, 36–37; *State* v. *Miller*, 71 Kan. 491, 492; *Orme* v. *Commonwealth*, 21 Ky. L. Rep. 1412, 1413–1414; *State* v. *Sadler*, 51 La. Ann. Rep. 1397, 1401–1410; *Brown* v. *Lunt*, 37 Me. 423, 428–433; *Commonwealth* v. *DiStasio*, 297 Mass. 347, 350–352, certiorari denied, 302 U.S. 683; *People* v. *Townsend*, 214 Mich. 267, 270–271; *State* v. *Brown*, 12 Minn. 538; *Pringle* v. *State*, 108 Miss. 802, 809; *State* v. *Rich*, 20 Mo. 393, 396–397 (dicta); *Tucker* v. *Myers' Estate*, 151 Neb. 359, 367; *Walcott* v. *Wells*, 21 Nev. 47, 54–56; *Byer* v. *Harris*, 77 N.J.L. 304, 309; *State* v. *Blancett*, 24 N. Mex. 433, 448–449, writ of error dismissed, 252 U.S. 574; *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147–148, certiorari denied, 273 U.S. 695; *State* v. *Harden*, 177 N.C. 580, 583–584; *Youmans* v. *Hanna*, 35 N.D. 479, 518–523; *Stiess* v. *State*, 103 Ohio St. 33, 41–43; *Morgan* v. *State*, 66 Okla.

The *de facto* doctrine has been applied to deny standing to private litigants who have challenged the very right of the incumbent to hold judicial office. *E.g., Pringle* v. *State*, 108 Miss. 802, 808–809 (where the judge was appointed by the governor, while the state constitution required that judges be elected by the populace); *Orme* v. *Commonwealth*, 21 Ky. L. Rep. 1412, 1413–1414 (where an individual was elected as judge, but there was no ordinance providing for the calling of the election, as state law required); *Snow* v. *State*, 134 Tex. Crim. App. 263, 265–267 (where the challenged party, during the same term of the legislature for which he was elected, was selected as a judge, the state constitution expressly denying the eligibility of a legislator to hold office as a judge during the same term of the legislature which raised the emoluments of the particular judicial office). See also *Commonwealth* v. *Di Stasio*, 297 Mass.

Crim. Rep. 205, 210–211; *State ex rel. Madden* v. *Crawford*, 207 Ore. 76, 90; *Clark* v. *The Commonwealth*, 29 Pa. St. 129, 138; *Cromer* v. *Boinest*, 27 S.C. 436, 441–444; *State* v. *Ness*, 75 S.D. 373, 376–377; *Ridout* v. *State*, 161 Tenn. 248, 268; *Snow* v. *State*, 134 Tex. Crim. Rep. 263, 266–268; *McGregor* v. *Balch*, 14 Vt. 428, 436–437; *McCraw* v. *Williams*, 74 Va. 510, 512–514; *State* v. *Britton*, 27 Wash. 2d 336, 344–346; *State* v. *Carter*, 49 W. Va. 709, 711–712; *Baker* v. *State*, 80 Wis. 416, 419. Cf. *Jeffords* v. *Hine*, 2 Ariz. 162, 168–169; *State ex rel. James* v. *Deakyne*, 41 Del. 217, 222–223; *Florida ex rel. Attorney General* v. *Gleason*, 12 Fla. 190, 229–234, writ of error dismissed *sub. nom. Gleason* v. *Florida*, 9 Wall. 779; *Crawford* v. *Howard*, 9 Ga. 314, 316–317; *Ex parte Strahl*, 16 Ia. 369, 370–371; *Buckler* v. *Bowen*, 198 Md. 357, 365–367; *Marcellus* v. *Wright*, 61 Mont. 274, 289–290; *Attorney General* v. *Megin*, 63 N.H. 378, 379; *State* v. *Lane*, 16 R.I. 620, 626; *May* v. *City of Laramie*, 58 Wyo. 240, 276. See *Wenner* v. *Smith*, 4 Utah 238, 245.

347, certiorari denied, 302 U.S. 683; *State* v. *Blancett*, 24 N. Mex. 433, 446–447.

There is, however, conflict in the states as to whether the title of a "special" or "temporary" judge may be questioned by party litigants. Some courts, following the general rule as to regular or permanent judges, will not permit such attack. *E.g.*, *Bird* v. *State*, 154 Miss. 493, 499–500; *State* v. *Miller*, 111 Mo. 542, 549; *Barden* v. *State*, 98 Neb. 180, 182; *State* v. *Harden*, 177 N.C. 580, 583–584; *Garza* v. *State*, 120 Tex. Crim. Rep. 147, 148. Other courts, on the theory that such a judge possesses the right to hold office only through some special type of selection, permit such challenges if made in a timely fashion in the court where the temporary or special judge sits. *E.g.*, *Lillie* v. *Trentman*, 130 Ind. 16, 20–21; *Schlungger* v. *State*, 113 Ind. 295, 296; *Salyer* v. *Napier*, 21 Ky. L. Rep. 172, 173; *Lacy* v. *Barrett*, 75 Mo. 469, 472–473; *State* v. *Holmes*, 12 Wash. 169, 179–180.

However, it is the unanimous rule in all American jurisdictions (which have passed on the problem) that the question may not be raised for the first time on appeal. See, *e.g.*, *Lamar* v. *United States*, 241 U.S. 103; *Moreno Rios* v. *United States*, 256 F. 2d 68 (C.A. 1); *United States* v. *Marachowsky*, 213 F. 2d 235 (C.A. 7) certiorari denied, 348 U.S. 826; *Greenwood* v. *State*, 116 Ind. 485; *State* v. *Schuermann*, 146 La. 110; *Bird* v. *State*, 154 Miss. 493; *Rives* v. *Pettit*, 4 Ark. 582. As the Supreme Court of Indiana stated in refusing to entertain the appellant's collateral attack upon a special judge who presided over the cause (*Lillie* v. *Trentman*, *supra*, 130 Ind. at 21):

> A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings; or not disposed to go into trial, when the cause is ready for trial, to be able, in a moment, to arrest proceedings, and oust the jurisdiction of the judge, can not be tolerated.

Since the petitioner did not challenge the authority of Judge Jackson to sit until the appellate stage, even those rulings sanctioning a challenge where the objection to the judge's authority is timely lodged in the court where the judge sits are of no avail to this petitioner.

3. The title to office or the exercise of judicial authority of a *de facto* judge may normally be challenged only in a direct proceeding—usually in the nature of a *quo warranto* action—instituted by the sovereignty in whose name the judge is exercising judicial authority.[27] See 1 Freeman, *Judgments* (5th ed., 1925), Sec. 327, and cases cited; Church, *Habeas Corpus* (2d ed., 1893), Secs. 256, 257, and cases cited. Cf. *Ball* v.

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[27] *Spradling & Thomas* v. *State*, 17 Ala. 440, 446; *Jeffords* v. Hine, 2 Ariz. 162, 168–169; *State of Florida* v. *Gleason*, 12 Fla. 190; *People ex rel. Ballou* v. *Bangs*, 24 Ill. 184, 186–187; *Ex parte Strahl*, 16 Ia. 369, 371; *State* v. *Williams*, 61 Kan. 739, 741; *State* v. *Sadler*, 51 La. Ann. Rep. 1397, 1402; *Answer of the Justices*, 122 Mass. 600, 603, 604; *State* v. *Rich*, 20 Mo. 393, 396–397; *Walcott* v. *Wells*, 21 Nev. 47, 54–55; *State ex rel. Bockmeier* v. *Ely*, 16 N.D. 569; *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147, certiorari denied, 273 U.S. 695; *Stiess* v. *State*, 103 Ohio St. 33, 41; *Morgan* v. *State*, 66 Okla. Crim. Rep. 205, 210–211; *Ridout* v. *State*, 161 Tenn. 248, 259–260; *Snow* v. *State*, 134 Tex. Crim. Rep. 263, 266–268; *McGregor* v. *Balch*, 14 Vt. 428, 437.

United States, supra, 140 U.S. at 128–129; *Ex parte Ward, supra,* 173 U.S. at 456. In such a proceeding, the judge is formally made aware of the challenge to his title and is afforded an opportunity to defend his position. In the District of Columbia, that would be done under 16 D.C. Code 1601–1608 which provides that the Attorney General of the United States or the United States Attorney for the District of Columbia may institute, either on their own motion or on the relation of a third party, a proceeding in *quo warranto* to try the title to hold office; or, should the Attorney General or United States Attorney refuse or fail to act in the matter, a third party may institute similar proceedings by filing a verified petition in the District Court for the District of Columbia."

4. Our position in this case—that Judge Jackson was at least a *de facto* judge whose title to office and whose exercise of judicial authority are not open to attack in this proceeding—is not inconsistent with the decision of this Court and the position taken by the government in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685. In that case, a retired judge of the Court of Appeals for the Second Circuit sat during an *en banc* rehearing and cast the decisive vote, although 28 U.S.C. 46(c) expressly limited *en banc* proceedings to the "active circuit judges of the circuit." The government contended that the retired judge could not be deemed a *de facto* judge because a specific legislative mandate precluded him from participating in the *en banc* proceedings. See Brief for the United States in *United States* v. *American-Foreign Steamship Corp.*, No. 138, O.T.

1959, pp. 24–28. In other words, 28 U.S.C. 46(c), eliminating retired circuit judges from *en banc* proceedings in the courts of appeals, also eliminated the *office* of retired judges in those matters. And, since there cannot be a *de facto* judge unless there is first a *de jure* office to fill (*Norton* v. *Shelby County*, *supra*, 118 U.S. at 443–444, 449; see *In re Manning*, 139 U.S. 504, 506–507), the retired judge in the *American-Foreign* case could not have been a *de facto* officer; there was no *office* for him to fill.[28] In the instant case, it is undisputed that Judge Jackson occupied a *de jure* office—District Judge on the District Court for the District of Columbia—and since he filled that office in good faith and under color of authority, he was at least a *de facto* occupant of that *de jure* office.

Similarly, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, a case on which the petitioner in large part relies, turned on the *de jure* composition of the court itself. There, a three-judge district court was convened according to law and heard the case. When one of the judges subsequently became ill, the remaining two judges determined the matter without the assistance of the third judge. This Court, in holding the action taken by the two judges to be void, pointed out that the statute specifically intended that such cases be determined by a district court of three judges. The Court said that the requirement of a three-judge district court "is not a broad social measure to be construed with liberality. It is a tech-

[28] In addition, in the *American-Foreign* case, the United States contested the right of the retired circuit judge to sit on the *en banc* court as soon as it was apprised that he had done so. See 363 U.S. at 687.

nical rule of procedure to be applied as such." *Id.* at 136. The statute in *Ayrshire*, unlike the situation at bar, took away the *offices* of two of the judges of the three-judge district court during the absence of the third judge—*i.e.*, the *office* of judge on a three-judge district court exists in legal contemplation only when three such judges, no more and no less, are sitting as such. That is not the case here, for the office of District Judge of the District Court for the District of Columbia exists irrespective of the mode or the manner in which Judge Jackson was selected to fill that office or of Judge Jackson's qualifications to do so.[29]

B. *Judge Jackson is and has been an Article III judge, at least since 1958, and is fully competent to sit on the District Court for the District of Columbia.*

We have also suggested (*supra*, pp. 47–48) that—regardless of the status of the Court of Customs and Patent Appeals, as a court, in 1952, 1958, or today [30]—

[29] *Ford v. Kelly*, 302 U.S. 312, posed a different problem. There, a judge sitting by designation in the Southern District of New York concluded a criminal case. Subsequently, while acting in his regular capacity as a judge of the Eastern District, he, with the consent of parties, entertained a petition in the case for discharge from probation and termination of proceedings under the provisions of the Probation Act. This Court held that this petition was a new matter which could be determined only by the court of the district of trial. Since the judge did not even purport to act as a judge of the Southern District (the district of trial), when he ruled on the discharge from probation, the *de facto* doctrine was not really involved.

[30] It would be possible for a court to be considered a legislative court even though its judges (or some of them) are Article III judges, if the touchstone for testing the status of a federal court (as this Court has stated it) remains the power actually exercised by Congress in creating the tribunal. See

Judge Jackson is and has been (at least since 1958) an Article III judge fully competent to sit on the District Court for the District of Columbia.

1. Judge Jackson has all the qualifications of an Article III judge. He has life tenure and performs judicial duties. The provision in the 1958 Act (part of 28 U.S.C. 211, App. A, *infra*, p. 128) that the Court of Customs and Patent Appeals "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court (including its retired judges). If they were not such before, since the 1958 statute those judges have been Article III judges in the same category as the judges appointed to the various district courts and courts of appeals.

2. No difficulty is raised by the fact that Judge Jackson may also be called to sit in a legislative court (if the Court of Customs and Patent Appeals be deemed such). On that tribunal, his duties would be primarily judicial (on any view of the court's patent and trade-mark jurisdiction) and the issues with which he would be concerned would arise under the Constitution and laws of the United States. It is settled, we believe, that Article III judges may con-

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Ex parte Bakelite Corporation, 279 U.S. 438, 459-460; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 640-644 (opinion of Vinson, C. J.). Under that test, if the power exercised lies outside of Article III, the court is a legislative one.

stitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the powers specified in that Article. See *United States* v. *Duell*, 172 U.S. 576, 589. This Court and the courts of appeals have heard cases from Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Philippines, as well as from other former territories—in cases in which judicial power has been exercised under provisions of the Constitution other than Article III. To the extent that the Customs Court, the Court of Customs and Patent Appeals, and the Court of Claims have been considered legislative tribunals (*Ex parte Bakelite Corporation*, 279 U.S. 438; *Williams* v. *United States*, 289 U.S. 553), the Justices of this Court have been deciding, on review, issues from courts thought to be established under Article I rather than Article III. See *Pope* v. *United States*, 323 U.S. 1, 13–14. Similarly, there would be no reason why a circuit judge or a district judge from a district within a state could not sit, by assignment, on the District Court for Puerto Rico, for the Virgin Islands, or for Hawaii (before it became a state); and regardless of whether the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are constitutional courts, there appears to be no valid constitutional reason why circuit and district judges would be incompetent to sit on those tribunals.

Moreover, history and practice show that there is no rigid rule precluding Article III judges from exercising any non-judicial function. Constitutional judges have not infrequently accepted and performed non-judicial governmental assignments of

various kinds, while retaining their judicial offices. See Hart and Wechsler, *The Federal Courts and the Federal System* (1953), pp. 102–105. Perhaps the most important instance was the participation by five Justices in the Presidential Election Commission of 1877, pursuant to the Act of January 29, 1877, 19 Stat. 227, 228 (see Morison and Commager, *The Growth of the American Republic* (Vol. 2, 4th ed. 1956), pp. 77–78). At the present time constitutional judges regularly sit on official judicial conferences which recommend legislation to Congress and take other steps not strictly within the judicial power granted by Article III. Judges of some lower courts appear to have given opinions to legislative bodies, in the role of commissioners and not strictly as Article III judges (see footnote 85, *infra*, p. 125). See also the extradition statutes, 18 U.S.C. 3184, 3186.

The general principle thus illustrated is, we believe, that Article III *judges* (as distinguished, perhaps, from Article III *courts*) may validly perform certain non-Article III or non-judicial functions while retaining their positions as constitutional judges. The extent to which this can be done is still unclear, but we submit that non-judicial or non-Article III duties which are closely related or comparable to judicial functions under Article III are most probably within the allowable area. To the extent that the judges of the Court of Customs and Patent Appeals may exercise such non-judicial and non-Article III powers in the fields of tariff law, patents, and trade-marks (see *infra*, pp. 116–121), their duties are both closely related and comparable

to the "judicial power" which is the subject of Article III. See the discussion, *infra*, pp. 121–126.

In any event, a claim that Article III and non-Article III functions cannot be mixed is wholly incorrect for the District of Columbia District Court on which Judge Jackson has been sitting. If one thing is clear in this field of the law, it is that the judges of the superior District of Columbia courts may exercise both judicial and non-judicial functions, as well as both Article III functions and non-Article III functions. *O'Donoghue* v. *United States*, 289 U.S. 516, 545–548; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Keller* v. *Potomac Electric Co.*, 261 U.S. 428. See *infra*, pp. 121–125.

3. Nor can it be said that the 1958 Act, in renouncing Congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals, so changed the character of the office as to require a new Presidential appointment. These judges already had life tenure, on appointment of the President, and their salaries were fixed by law. Congress merely gave up its potential authority to shorten their terms or to lower their compensation. Though this change sufficed to make the members of the court Article III judges,[31] it did not interfere with the President's appointment power, any more than would a statutory increase in salary or emoluments. Congress has often made far more drastic alterations in the tenure or compensation of existing officials without encroaching upon the Presidential power of appointment—changes in salary, re-

[31] We are assuming, *arguendo*, in this section of our brief, that the judges were not constitutional judges before 1958.

tirement benefits, other emoluments, duties, and even terms of office. In the absence of a clear Congressional purpose to abolish the old office and create a new one, a change of the type involved here does not constitutionally require a new appointment and new confirmation.

4. Under our view, the judges of the Court of Customs and Patent Appeals would remain Article III judges even if Congress abolished the court and ended or transferred its functions. When the Commerce Court was abolished in 1913, its judges continued as circuit judges assigned to Article III courts. On the Commerce Court, see footnote 56, *infra*, p. 89, Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 153-174, 234; *Dorregan* v. *Dyson*, 269 U.S. 49.

C. *The Court of Customs and Patent Appeals was created by Congress as, and has always been, an Article III court.*

It is also the government's position that the Court of Customs and Patent Appeals, as a court, was created, and has always been, an Article III court.[32] The

[32] The classification of courts of the United States into two categories—"constitutional" courts, consisting of this Court and those "inferior Courts" which Article III, Section 1, of the Constitution authorizes Congress from time to time to ordain and establish, and in which is vested the "judicial Power of the United States", and "legislative" courts, consisting of courts created by Congress pursuant to powers conferred by other articles of the Constitution—had its origin in *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828), involving the status and character of territorial courts. The genesis and development of the distinction are discussed in 1 Moore, *Federal Practice* (2d ed., 1960), § 0.4, pp. 53-73; Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894 (1930); Watson, *The Concept of the Legislative Court: A Constitutional Fiction*, 10 Geo. Wash.

language and history of the statute creating the court and its subsequent history are persuasive that this is so. And in the 1958 Act Congress meant, we believe, simply to declare what powers it had exercised when it established the Court, not to turn a previously legislative tribunal into a constitutional court.[33]

Indeed, the very purpose of the 1958 statute was to negate, so far as possible, this Court's holding in *Ex parte Bakelite Corporation*, 279 U.S. 438 (1929), that the Court of Customs Appeals was a legislative court because Congress had created it under the tariff power conferred by Article I. That decision had been rendered without the benefit of an explicit and authoritative declaration by the body which created the court as to which of its constitutional powers was exercised

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L. Rev. 799 (1942); Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 Col. L. Rev. 344 (1934); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 Col. L. Rev. 746 (1934); Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 Yale L. Journ. 316 (1933); see also *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582. The terminology is somewhat misleading; as has been pointed out (see, *e.g.*, 1 Moore *op. cit.*, §0.4[1], pp. 53–54), all federal courts might be characterized as constitutional courts since they are established either by the Constitution itself or by Congress acting under some constitutional grant of power. Constitutional courts are sometimes referred to, more accurately, as "courts established under Article III of the Constitution", or "Article III" courts. We shall usually use the latter term in this brief.

[33] Our brief in opposition to certiorari (No. 480 Misc., this Term) was based on the assumption that the 1958 amendment changed the character of the court from a legislative to a constitutional court (see pp. 7–8). However, our further study of the Act and its legislative history (see *infra*, pp. 66–74) convinces us that its purpose was to clarify, not alter, the court's status.

in bringing the court into being. Had such a declaration been before the Court when it decided the *Bakelite* case, it would, we submit, have reached the contrary result. And this, we think, was the reasoning of Congress in enacting the 1958 Act. It also seems doubtful whether the Court fully took account of the pertinent historical considerations to which we shall refer (*infra*, pp. 75–97). We discuss the *Bakelite* opinion in detail, *infra*, pp. 97–108).[34]

1. *Congress, by the Act of August 25, 1958, declared the Court of Customs and Patent Appeals to be a court which had been established under Article III of the Constitution.*

The Act of August 25, 1958, § 1, 72 Stat. 848, amended Section 211 of Title 28 of the United States

[34] It is pertinent to note that this Court, in holding that the superior courts of the District of Columbia were established under Article III (*O'Donoghue* v. *United States*, 289 U.S. 516 (1933)), found it necessary to repudiate its *dicta* to the contrary in the *Bakelite* case (279 U.S. at 450, 460), decided four years earlier. It did so, moreover, without the benefit of a congressional statement so declaring, such as now exists with respect to the Court of Customs and Patent Appeals.

In other *dicta* in the *Bakelite* case (279 U.S. at 452–455), the Court expressed the view that the Court of Claims was a legislative court, and in *Williams* v. *United States*, 289 U.S. 553 (1933), the Court, approving these *dicta*, so held. In *Pope* v. *United States*, 323 U.S. 1, the government (reversing its position in the *Williams* case) argued, on the basis of its study of the history of the Court of Claims and the decisions of this Court prior to the *Williams* case, that *Williams* had been wrongly decided and should be overruled. See Brief for the United States, No. 26, Oct. Term, 1944, pp. 60–109. The Court, however, found it unnecessary to reach the question. 323 U.S. at 13. Subsequently, in 1953 (see *infra*, pp. 67–71), Congress passed an Act, similar to the 1958 Act, declaring the Court of Claims to be established under Article III. See also *infra*, pp. 110–114.

Code (the Code provision codifying the statute which created the Court of Customs and Patent Appeals) by adding, after the words

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals

a new sentence, reading:

> Such court is hereby declared to be a court established under article III of the Constitution of the United States.

(*a*). The language of the amendment shows that its purpose was, not to *make* the Court of Customs and Patent Appeals an Article III court, but to declare that it *was* such a court. The purpose was not to change the character of the court from a legislative court to one established under Article III, but to declare that it had been from its creation such a court. Congress, in short, formally and authoritatively declared, through an amendment of the organic act creating the court, that in bringing the court into being it had exercised its power under Article III to create inferior federal courts.

(*b*). The legislative history of the measure confirms this purpose.

In 1953 and 1956, Congress enacted with respect to the Court of Claims and the Customs Court the identical legislation which it enacted in 1958 for the Court of Customs and Patent Appeals. Act of July 28, 1953, c. 253, § 1, 67 Stat. 226; Act of July 14, 1956, c. 589, § 1, 70 Stat. 532. The 1953 Act added to Section 171

of Title 28 (establishing the Court of Claims) the identical sentence—"Such court is hereby declared to be a court established under article III of the Constitution of the United States"—which the 1958 Act added to Section 211, and the 1956 Act added the same language to Section 251 (providing for the Customs Court). All three statutes must be read *in pari materia*.

The bill which became the 1953 Act was H.R. 1070, 83d Congress. The House Judiciary Committee, in reporting it out, made clear that its purpose was declaratory. H. Rept. 695, 83d Cong., 1st sess., said (p. 2):

> The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court, the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the

Court of Claims whenever such action is considered necessary or expedient. * * * [35]

A companion Senate bill, S. 1349, differed from the House bill in that, instead of adding the statement "Such court is hereby declared to be a court established under article III of the Constitution, of the

[35] In the same vein, the report went on to say (pp. 3–5):

The first section of the bill declares the Court of Claims to be a court established under article III of the Constitution, i.e., a "constitutional court." Need for this declaration arises from the decision of the Supreme Court in 1933 in the case of *Williams* v. *United States* (289 U.S. 553), which held that the Court of Claims was not one of the inferior courts established by Congress under article III of the Constitution, but rather was created by Congress as a "legislative court" in the exercise of congressional powers under article I, to pay the debts of the United States. Section 1 of the bill should remove any doubt that the Court of Claims is a constitutional court.

* * * * *

It seems certain that Congress, when it established the Court of Claims in 1954 [*sic;* should read "1855"], intended to create a court under article III. [A discussion of the legislative history of the 1855 Act and the judicial precedents relating to the Court of Claims prior to the *Williams* decision follows.]

* * * * *

In the Williams litigation the Department of Justice took the position that the Court of Claims was not an article III court. But years subsequent to that decision and after restudy of the question, the Department of Justice filed an extensive brief in *Pope* v. *United States* (323 U.S. 1 (1944)), taking the position that the *Williams* case was wrong.

In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power.

United States" to Section 171 of Title 28 as a separate sentence, it proposed to amend the section so as to make it read, in a single sentence:

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record *established under article III of the Constitution of the United States and* known as the United States Court of Claims.[36]

When the bill came up for debate, Senator Gore requested that the House bill, H.R. 1070, be substituted for it. 99 Cong. Rec. 8943–8944. He explained that he objected to the Senate bill because of "the manner in which it undertook to change the status of the Claims Court from a legislative court to a constitutional court." *Id.*, p. 8943. "The language of the first section of that [Senate] bill," he said, "is such that I believe the President could have assumed that Congress intended that he should reappoint the present judges, or appoint new judges, to what I think he could have properly regarded as a new court." *Ibid.* After pointing out that "This deficiency, namely, this change in the character of the court, could produce many serious consequences," the Senator stated (*ibid.*):

> The language of H.R. 1070, I believe, successfully avoids these unhappy possibilities. By simply declaring that the existing Court of Claims should be a court established under article III of the Constitution, this bill makes

[36] See S. Rept. 261, 83d Cong., 1st sess., p. 3, on S. 1349. The italicized words were proposed to be added to the section by the Senate bill.

> it clear that the Congress does not intend to create a new court. In any event, I think it is desirable that the legislative history show with utmost clarity that in passing this bill Congress is not establishing a new Court of Claims.

Senator McCarran, the sponsor of the Senate bill, while disagreeing with Senator Gore as to the bill's effect, interposed no objection to the substitution of the House bill, which was thereupon voted on and passed. *Id.*, p. 8944.[37]

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[37] The Senate committee report which originally accompanied S. 1349 (S. Rept. 261, 83d Cong., 1st sess.) stated in part (p. 2):

> The United States Court of Claims, as it now exists, is a legislative court. This was decided in the case of *Williams* v. *United States* (289 U.S. 553). * * *
>
> The fact that the Court of Claims is not a "constitutional court" raises many complications. * * * There appears to be no doubt but that the Court of Claims could, therefore, have been created under said article III. The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end. * * *

A "corrected report" (S. Rept. 275, 83d Cong., 1st sess.) was substituted for this report. 99 Cong. Rec. 5020. The corrected report substituted for the last sentence of the above-quoted excerpt the following (p. 2):

> The committee is of the opinion that Congress intended it to have been so created, and this bill accomplishes this end.

It seems probable that this change between the original and the corrected report is indicative of the declaratory intent of the 1953 Act. On the other hand, in later reports—S. Rept. 2352, 83d Cong., 2d sess., p. 2, on S. 2975 (a bill introduced in the 83d Congress to declare the Customs Court to be an Article III court, but which was passed over), S. Rept. 2353, 83d Cong., 2d sess., p. 2, on S. 3131 (a bill introduced in the 83d

The 1956 Act, as we have said, added to Section 251 of Title 28 (relating to the Customs Court) the same sentence which the 1953 Act added to Section 171 (for the Court of Claims). The bill which became the 1956 Act, S. 584, 84th Congress, passed both Houses without debate. 102 Cong. Rec. 7264, 11589. The House committee report on the bill referred to the fact that "[s]imilar legislation" had been enacted in the previous Congress with respect to the Court of Claims, and described the purpose of the bill as "to remove all doubt as to the status of the Customs Court as a court established under article III" and "declare which of the powers Congress was intending to exercise when the court was created." H. Rept. 2348, 84th Cong., 2d sess., p. 2. The Senate committee report likewise described the purpose of the bill as "to declare the Customs Court to be a constitutional court" (S. Rept. 1827, 84th Cong., 2d sess., p. 1).[38]

Congress to declare the Court of Customs and Patent Appeals to be an Article III court, but which was passed over), and S. Rept. 1827, 84th Cong., 2d sess., p. 2, on S. 584 (the bill which became the 1956 Act declaring the Customs Court to be an Article III court)—the language of the last sentence of the quoted passage from the original report, S. Rept. 261, 83d Cong., 1st sess., *supra*, continued to be used. It is evident that the statement "The United States Court of Claims, as it now exists, is a legislative court", in context, meant only that it had been so held by this Court in the *Williams* case. See, also, fn. 38, *infra*, pp. 72–73. The failure to conform the language of the later reports to the "corrected" language of S. Rept. 275, 83d Cong., 1st sess., *supra*, must be attributed to oversight.

[38] The Senate report also stated, in explaining the purpose of the bill, that "The Customs Court, as it now exists, is a legislative court" (p. 2). A similar statement, made with re-

The immediate legislative history of the 1958 Act further confirms Congress' purpose in amending the Code section establishing the Court of Customs and Patent Appeals. The bill was H.R. 7866, 85th Congress. Both the House and the Senate committee reports referred to the prior actions of Congress in making similar declarations for the Court of Claims and the Customs Court, and stated that (as in the case of the prior Acts) the object of the bill was to remove all doubt as to the status of the Court of Customs and Patent Appeals as a court created pursuant to, and deriving its powers from, Article III of the Constitution. H. Rept. 2349, 85th Cong., 2d sess., pp. 2–3; S. Rept. 2309, 85th Cong., 2d sess., pp. 2–3. The explanations by the sponsors of the bill on the floor of the House immediately prior to passage were to the same effect. 104 Cong. Rec. 16094–16095. Repre-

spect to the Court of Claims, appeared in both the original and the corrected Senate committee report accompanying S. 1349, 83d Congress. See fn. 37, *supra*, pp. 71–73. And a like statement, pertaining to the Court of Customs and Patent Appeals, appeared in S. Rept. 2353, 83d Cong., 2d sess., p. 1, on S. 3131 (an earlier bill which would have declared the Court of Customs and Patent Appeals to be an Article III court). The contexts in which these statements were made reveal that the committee meant that these courts had been held to be, or were generally considered as, legislative courts. Thus, in S. Rept. 261, 83d Cong., 1st sess. (quoted in part in fn. 37, *supra*, pp. 71–72), immediately following the statement ("The United States Court of Claims, as it now exists, is a legislative court"), the committee explained: "This was decided in the case of *Williams* v. *United States* (289 U.S. 553)." And, of course, in *Ex parte Bakelite Corporation*, 279 U.S. 438, 457–461, this Court held the Court of Customs and Patent Appeals to be a legislative court, and indicated that the Customs Court was likewise such a court.

sentative Keating stated that the bill would "complete * * * the action which Congress initiated in declaring the Customs Court to be a constitutional court" and "remove all doubt as to the status of the Court of Customs and Patent Appeals" by "expressly declar[ing] that court to be 'a court established under Article III of the Constitution of the United States' ". 104 Cong. Rec. 16095. Representative Celler explained that the bill would make "no change in the structure, organization, or jurisdiction of the court." *Ibid.* Similarly, on the Senate floor, Senator Talmadge, on behalf of the Chairman of the Judiciary Committee, explained that the "precedent for this proposed legislation" was "a similar provision relating to the customs court" enacted by the previous Congress. 104 Cong. Rec. 17549.[39]

[39] It is true that Senator Talmadge referred to the Customs Court as having been "made a constitutional court" by the 1956 Act, and he referred to "the change of the Court of Customs and Patent Appeals from a legislative court to a constitutional court" which the pending bill would bring about. 104 Cong. Rec. 17549. But since the 1956 Act was, as we have seen, intended merely to declare the Customs Court to be a constitutional court, and since Senator Talmadge explained that the bill under discussion would merely accomplish with respect to the Court of Customs and Patent Appeals what the 1956 Act had accomplished with respect to the Customs Court, the Senator's reference to the bill as one which would "change" the Court of Customs and Patent Appeals from a legislative court to a constitutional one was merely an imprecise use of language. Compare the remark of Representative Keating, in the same statement in which he said that the bill before the House would merely "remove all doubt as to the status of the Court of Customs and Patent Appeals" (see the text, *supra*), that the court "should be established as" an Article III court. 104 Cong. Rec. 16095.

2. *The Court of Customs and Patent Appeals was in fact created by Congress as an Article III court.*

We now review the history of the Court of Customs and Patent Appeals to show that Congress in fact established it under Article III. *Infra*, pp. 75–97. We then attempt to demonstrate that *Ex parte Bakelite Corporation*, 279 U.S. 438, in which this Court decided to the contrary, reached an erroneous conclusion; and further argue that any doubt should be resolved, in the light of the formal and authoritative 1958 declaration by the court's creator, in favor of the court's genesis under Article III. *Infra*, pp. 97–108. Finally, we contend that there is no constitutional obstacle to giving effect to Congress's declaration. *Infra, pp.* 108–125.

(*a*). *The court's history shows that Congress established it pursuant to Article III.*

(*1*). *The creation and history of the court.*

i. The Court of Customs and Patent Appeals—originally the Court of Customs Appeals—was created by the Payne-Aldrich Tariff Act of August 5, 1909 (c. 6, § 28, 36 Stat. 11, 91, 105–108), to review the customs decisions of the Board of General Appraisers (now the Customs Court). The 1909 Act added to the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, a new section, 29, which read in part as follows (1st and 2d pars., 36 Stat. 105; Appendix A, *infra*, pp. 129–131):

> A United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the

advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum.[40] It shall be a court of record, with jurisdiction as hereinafter established and limited.

Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. * * * The court shall appoint a clerk, * * * who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. * * * The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided,* That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uni-

[40] See *infra*, pp. 86–88.

formity of decisions within its jurisdiction as conferred by law.

* * * * *

The similarities between the above language and that of the Act which established the circuit courts of appeals, indisputably Article III courts, are sufficiently striking to invite comparison. Section 2 of the latter Act (Act of March 3, 1891, c. 517, 26 Stat. 826–827) provided in part:

> There is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court [*sic*] with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. * * * The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the

> Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court.
>
> The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

The presiding judge of the newly created court was to be so designated in the commission issued him by the President, the associate judges were to have precedence according to the dates of their commissions, a quorum was to consist of any three judges, and the concurrence of three judges was to be necessary to any decision. § 29, 4th par., 36 Stat. 105; Appendix A, *infra,* p. 131. A court reporter and the publication of the court's decisions were provided for. § 29, 15th par., 36 Stat. 107–108; Appendix A, *infra,* pp. 135–136.

ii. In the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, the President was authorized, upon request of the presiding judge, to designate any qualified United States circuit or district judge or judges to act. § 29, 12th par., 36 Stat. 107; Appendix A, *infra,* p. 135. Upon the enactment of the Judicial Code of 1911 (see *infra,* pp. 88–89), this provision continued in effect as Section 188 (36 Stat. 1143). It remained in effect until 1948 (see 28 U.S.C. [1946 ed.] 301), when, upon the codification of present Title 28, the power of designation was transferred from the President to the Chief Justice and was broadened and generalized so as to eliminate the limitation of the designating power to the filling of "one or two"

vacancies. Section 293 of Title 28, U.S.C., as codified by the Act of June 25, 1948, c. 646, § 1, 62 Stat. 869, 901. The power of designation has since been further broadened. Under present law, all circuit and district judges and all judges of the Court of Claims and the Customs Court are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. 28 U.S.C. 291(b), 292(d), 293(d). See also *infra*, pp. 90–91, 94–95.

iii. As in the case of the Act which first created the district and circuit courts (Judiciary Act of September 24, 1789, c. 20, §§ 2–4, 1 Stat. 73–75) and implemented the clause of Article III, Section 1, of the Constitution, creating this Court by defining the number of justices who should constitute it and the number needed to constitute a quorum (*id.*, § 1, 1 Stat. 73), no provision applicable to the tenure of the judges was included. It was assumed throughout the debates on the bill that the judges of the new court would hold office during good behavior. See, *e.g.*, 44 Cong. Rec. 4185–4225. Thus, Senator McCumber, on behalf of the Committee on Finance (which had reported favorably on the proposal to establish the court), in referring to the need for greater uniformity in the adjudication of customs cases and for a court staffed with judges proficient in knowledge of the technical aspects of this field of law, said (44 Cong. Rec. 4199):

> [I]t was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject.

Similarly, Senator Dolliver, an opponent of the bill, questioned the need for "this new judicial tribunal, with a life term of office" (44 Cong. Rec. 4188), and referred to the proposed court as "a new court in the United States with lifelong tenure." 44 Cong. Rec. 4187.[41] So far as we are aware, it has never been doubted that the judges of the court have from the beginning held tenure during good behavior.[42]

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[41] Compare Representative Payne's statement during the House debates (44 Cong. Rec. 4697):

> [The circuit courts] do not seem to have given them [customs cases] the consideration which their importance demands We propose a district court that will have nothing else to do but to give its entire time to these questions, and we propose a salary of $10,000 a year, so that the President can select them from those standing highest in their profession, great lawyers, who by the dignity of the position and the salary that is attached to it and the location of the court in the city of Washington will be induced to take these places, that they may become trained experts in tariff law, and so that we may have uniformity of decisions.

[42] In *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928)—the decision which gave rise to this Court's *Bakelite* decision (see *infra*, pp. 98-102)—the Court of Customs Appeals, nineteen years after its creation, stated that the judges of the court "were commissioned for life" (p. 199), and cited evidence from the legislative history of the organic act showing such to have been the legislative intent (pp. 198–199). This Court, in the *Bakelite* case, did not question the fact of the judges' tenure during good behavior, but held it to be inconclusive as to the court's character as a constitutional or legislative tribunal. 279 U.S. at 459-460.

In 1930, Congress expressly provided—for the first time—that the judges of the Court of Customs and Patent Appeals should hold office during good behavior. Section 646 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 762. It is evident, however, from what has been said that the purpose of this

ir. The court was given "exclusive appellate jurisdiction" to review—at the instance either of importers of merchandise or the collectors of customs at the several ports—all final decisions of the Board of General Appraisers (the predecessor of the United States Customs Court),[11] both as to law and fact, in

provision was to make explicit what had previously been understood. Thus, Representative Hawley, in explaining the purpose of the proposed amendment during the debates in the House, stated that, as a consequence of the then-recent *Bakelite* decision, holding the Court of Customs and Patent Appeals to be "a legislative tribunal and not a constitutional court," the members of the court "do not have a term of office unless it was specially provided," and that the amendment would "give them the usual tenure of office during good behavior." 71 Cong. Rec. 2042. And see the comment of Representative Chindblom, immediately following, that "When this court was established it was believed to be a constitutional court [and] that it was not necessary to fix the term." 71 Cong. Rec. 2043. That the purpose was to make explicit what had formerly been assumed would appear to be confirmed by the further provision of Section 646 that: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929 [the date as of which its patent jurisdiction was transferred to it and its name was changed to the Court of Customs and Patent Appeals; see *infra*, pp. 91–92, 116 ff.], shall be considered as having been rendered under an appointment to hold office during good behavior."

[11] The Board of General Appraisers was created by Section 12 of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, 136. In 1926, its name was changed to the United States Customs Court, without any accompanying change in its powers, organization, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The history of the Board-court is summarized in Appendix B, *infra*, pp. 137–141. As there pointed out, the purpose of the 1926 Act was to make what

cases respecting the "classification of merchandise and the rate of duty imposed thereon under such classification," the "fees and charges connected therewith;" "all appealable questions as to the jurisdiction of" the Board, and "all appealable questions as to the laws and regulations governing the collection of the customs revenues." § 29, 7th par., 36 Stat. 106; Appendix A, *infra*, pp. 132–133. The judgments of the court were made final.[45] *Ibid.*

The jurisdiction thus vested in the new court had previously been exercised by the circuit courts, the circuit courts of appeals, and this Court. Under Section 15 of the Customs Administration Act of 1890 (the Act which created the Board of General Appraisers), appeals lay to the circuit courts from decisions of the Board of General Appraisers in all classification and rate-of-duty cases, with certain limited rights of appeal to this Court. 26 Stat. 138.

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was a court in fact (and had been repeatedly so held), a court in name as well, to prevent confusion and misunderstanding. In 1956, Congress declared the Customs Court to be a court established under Article III of the Constitution. *Supra*, pp. 67–68, 72. Unlike the judges of the Court of Customs and Patent Appeals, who have enjoyed tenure during good behavior from the time of the court's creation (see *supra*, pp. 79–80), the judges of the Customs Court have possessed unqualified tenure during good behavior only since 1930. Appendix B, *infra*, pp. 138–140. Prior to that time, the President had the power (for stated causes) to remove its members. (From 1908 to 1930 the members of the Board-court held office "during good behavior", but subject to the President's removal power.)

[44] Now (as later amended) 28 U.S.C. 1541.

[45] It was not until 1914, five years after the creation of the Court of Customs Appeals, that this Court was given certiorari jurisdiction to review final judgments of that court. Act of August 22, 1914, c. 267, 38 Stat. 703. See *infra*, pp. 89–90.

In the following year, the circuit courts of appeals were created and given general appellate jurisdiction over final decisions of the circuit and district courts (except where direct appeal to this Court was authorized), with certificate and certiorari jurisdiction in this Court. Act of March 3, 1891, c. 517, §§ 5–6, 26 Stat. 826, 827–828.[46] Pursuant to these provisions, from the time of the creation of the Board of General Appraisers in 1890 until the vesting of exclusive appellate jurisdiction over the Board's decisions in the Court of Customs Appeals by the Payne-Aldrich Act of 1909 (*supra*, pp. 81–82), appeals from the Board's decisions were heard by the circuit courts, followed in many instances by further review by the circuit courts of appeals and this Court.[47] The debates in

[46] See also the Act of May 27, 1908, c. 205, § 2, 35 Stat. 404, amending Section 15 of the Customs Administration Act of 1890, so as to interpose circuit court of appeals review of Board of General Appraisers decisions between review by the circuit courts and review by this Court.

[47] Among the decisions which reached this Court were *United States* v. *Ballin*, 144 U.S. 1 (1892); *United States* v. *Jahn*, 155 U.S. 109 (1894); *United States* v. *Burr*, 159 U.S. 78 (1895); *United States* v. *Passavant*, 169 U.S. 16 (1898); *United States* v. *Salambier*, 170 U.S. 621 (1898); *United States* v. *Lies*, 170 U.S. 628 (1898); *United States* v. *Ranlett and Stone*, 172 U.S. 133 (1898); *Hoeninghaus* v. *United States*, 172 U.S. 622 (1899); *American Sugar Refining Co.* v. *United States*, 181 U.S. 610 (1901); *Lawder* v. *Stone*, 187 U.S. 281 (1902); *Downs* v. *United States*, 187 U.S. 496 (1903); *United States* v. *American Sugar Refining Co.*, 202 U.S. 563 (1906); *Franklin Sugar Co.* v. *United States*, 202 U.S. 580 (1906); *United States* v. *G. Falk & Brother*, 204 U.S. 143 (1907); *Goat and Sheepskin Co.* v. *United States*, 206 U.S. 194 (1907); *Faber* v. *United States*, 221 U.S. 649 (1911); *Altman & Co.* v. *United States*, 224 U.S. 583 (1912); see also *Anglo-Californian Bank* v. *United States*, 175 U.S. 37 (1899).

Congress, moreover, reflect Congress's full awareness that the jurisdiction which the bill would vest in the new court would be carved from jurisdiction previously exercised by the regular federal courts. See, *e.g.*, 44 Cong. Rec. 4185–4196, 4202, 4220, 4697–4698.[a]

Appeals to "any other court" than the newly established court from decisions of the Board of General Appraisers were specifically prohibited. § 29 (of the 1890 Act, as amended by the 1909 Act, see *supra*), 6th par., 36 Stat. 106; Appendix A, *infra*, pp. 131–132. A *proviso* to the latter paragraph preserved the jurisdiction of this Court to hear and decide cases already certified to it from circuit courts of appeals and to review by writ of certiorari any case which had already been decided by, or which (being then pending) was there-

[a] Illustrative of the tenor of much of the debates was the statement by Senator Dolliver, an opponent of the legislation: "Now, then, the only question left is whether these courts [the Circuit Court for the Southern District of New York, the Circuit Court of Appeals for the Second Circuit, and this Court] are so burdened by this litigation [appeals from the Board of General Appraisers] as to require relief." 44 Cong. Rec. 4187. See also the statistics concerning appeals from the Board of General Appraisers, decided by the Circuit Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit during the year May 1, 1908, through April 30, 1909, which Senator Borah (also an opponent of the bill) inserted in the Congressional Record during the debates. 44 Cong. Rec. 4186. And see the statements of Representative Payne, the sponsor of the measure in the House, criticizing the manner in which appeals from decisions of the Board of General Appraisers were then being handled in the circuit courts and circuit courts of appeals, and expressing the view that channeling all such appeals to a single customs appeals court, as proposed by the bill, would produce desirable uniformity and improve the administration of justice in customs matters. 44 Cong. Rec. 4697, *supra*, p. 80, fn. 41.

after decided by, a circuit court of appeals, provided application for such writ was made within six months following passage of the Act. *Ibid.*; Appendix A, *infra*, p. 132. A further *proviso* stated that all customs cases which had previously been decided by a circuit, district, or territorial court and had not been removed from such court by appeal or writ or error, or which, having been submitted for decision, remained undecided as of the date of the Act's passage, might (*ibid.*; Appendix A, *infra*, p. 132)—

> be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

As a consequence of this latter *proviso* (see also par. II, Appendix A, *infra*, pp. 134–135, providing for the transfer of cases from the circuit courts of appeals), many of the decisions of the Court of Customs Appeals during the early years of its existence involved cases transferred to that court from the circuit courts and circuit courts of appeals.[1] Not a few involved appeals from actual decisions of the circuit courts—the Court

[1] The cases reported at the following pages of volume 1 of the reports of the Court of Customs Appeals (covering the period June 22, 1910–April 24, 1911) were transferred from the circuit courts: 5, 29, 36, 47, 49, 82, 86, 93, 109, 115, 126, 146, 149, 158, 166, 168, 170, 171, 178, 181, 203, 205, 213, 220, 223, 228, 237, 239, 252, 255, 272, 279, 280, 287, 290, 297, 323, 334, 346, 353, 360, 385, 400, 404, 422, 426, 431, 437, 484, 489, 494, 510, 513, 518. For cases transferred from the circuit courts of appeals, see *id.*, pp. 10, 11, 16, 17, 25, 32, 53, 61, 79, 198, 562, 506. For later transferred cases, see, *e.g.*, vol. 2, pp. 1, 4, 9, 11, 43, 78, 89, 101, 116, 162, 181, 186, 189, 234, 237, 239, 243, 275, 278, 332, 336, 355, 512 (May 1, 1911–February 1, 1912)

of Customs Appeals affirming in some instances and in others reversing.[50] For example, the first reported decision of the Court of Customs Appeals was the reversal by that court of a decision of the Circuit Court for the Southern District of New York. *Hausen* v. *United States*, 1 Ct. Cust. App. 1 (1910).

c. On February 25, 1910, prior to the nomination or confirmation of any of the original judges of the then recently created Court of Customs Appeals,[51] the $10,000 salary initially fixed for its judges (see *supra*, p. 76) was changed to $7,000. Deficiencies Appropriations Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214. The result was to equate the salaries to be paid judges of the Court of Customs Appeals with those then being received by circuit judges.[52] See Act of February 12, 1903, c. 547, 32 Stat. 825. This equiva-

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[50] For decisions of affirmance, see cases reported in volume 1 at pp. 10, 16, 17, 32, 34, 51, 53, 61, 79, 144, 198, 242, 328, 341, 362, and in volume 2 at pp. 43, 101, 162, 234. For decisions of reversal, see vol. 1, pp. 1, 14, 25, 171, 228, 263, 321; vol. 2, p. 249. In *Prosser* v. *United States*, 1 Ct. Cust. App. 550 (1911), the Court of Customs Appeals affirmed in part and reversed in part a circuit court decision (*United States* v. *Thomas Prosser & Son*, 177 Fed. 569 (C.C.S.D.N.Y., 1910)).

[51] The five original judges of the court were nominated on March 9, 1910, and confirmed on March 30, 1910. 45 Cong. Rec. 2959, 4003. (Four of these had been first nominated previously, on January 5, 1910, but the nominations were later withdrawn. 45 Cong. Rec. 322, 2205.)

[52] Since the salaries were reduced before the court was staffed, there was no violation of the prohibition of Article III, Section 1, against diminishing the compensation of judges appointed under that article during their continuance in office. The reduction thus provides no argument that Congress considered the newly established court to be a non-Article III court. On the contrary, the aligning of the compensation fixed for its judges with that being received by circuit judges would indi-

lence continued under the Judicial Code of 1911. See Sections 118, 188, 36 Stat. 1131, 1143. In 1919, Congress increased the salaries of circuit judges from $7,000 to $8,500 per year, and in the same Act provided that the judges of the Court of Customs Appeals should receive salaries "equal in amount to" those provided therein for circuit judges, thereby granting the former an equivalent increase. Act of February 25, 1919, c. 29, §§ 2, 5, 40 Stat. 1156, 1157. In subsequent Acts raising judicial salaries, the judges of the Court of Customs Appeals have been treated on a par with circuit judges. Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (increasing the salaries of both from $8,500 to $12,500); Act of July 31, 1946, c. 704, § 1, 60 Stat. 716 ($12,500 to $17,500); Act of March 2, 1955, c. 9, § 1 (b), (c), 69 Stat. 9, 10 ($17,500 to $25,500).[53]

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cate that Congress intended to treat the Court of Customs Appeals as on a par with the circuit courts of appeals, which are indisputably Article III courts.

[53] By Section 107(a)(5) of the Legislative Appropriations Act of June 30, 1932, c. 314, 47 Stat. 382, 402, Congress provided that, for the fiscal year ending June 30, 1933, the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office" should be at the rate of $10,000 per annum if they were then at a rate exceeding that amount. As noted by petitioner, the judges of the Court of Customs and Patent Appeals voluntarily accepted a reduction in salary from $12,500 to $10,000 pursuant to this provision and—pursuant to a special provision authorizing the Treasury to accept from persons whose salaries were constitutionally immune to reduction such part of their pay as would otherwise not be paid them (§ 109, 47 Stat. 403)—specifically waived any constitutional exemption they might have had (Br. 47 n. 18). The action of the judges in so doing is, of course, understandable in the light of this Court's then recent decision in *Ex parte Bakelite Corporation*, 279 U.S.

The salaries established for the judges of the Court of Customs Appeals have always been greater than those fixed for district judges. Even as reduced by the Deficiencies Appropriation Act of 1910 (*supra*, p. 86), the salaries of $7,000 payable to the judges of the Court of Customs Appeals were $1,000 higher than those then being received by district judges. See Act of February 12, 1903, c. 547, 32 Stat. 825. The difference in their respective compensations has been widened by later Acts providing for pay increases.[54]

vi. When the Judicial Code was enacted in 1911 (Act of March 3, 1911, c. 231, 36 Stat. 1087), the provisions pertaining to the establishment, powers, and jurisdiction of the Court of Customs Appeals were transferred to the Code (with amendments not here pertinent) and codified as Chapter Eight (§§ 188–199, 36 Stat. 1143–1146) together with the provisions relating to the district courts, (Chapters One through Five), the circuit courts of appeals (Chapter Six), the Court of Claims[55] (Chapter Seven), the former

438 (1929), holding the court to be a legislative court whose judges did not enjoy the protection afforded by Article III. The statutory provision itself, however, did not evidence any congressional understanding whether the judges of the Court of Customs and Patent Appeals would be subject to the reduction in compensation. It was general in language, mentioning no court by name. For this reason, the 1932 Act is without significance on the issue of the kind of court Congress intended to establish when it created the Court of Customs Appeals. Moreover, since the judges voluntarily waived any claim of exemption they might have had, their action did not involve an acknowledgment that they were subject to the Act.

[54] Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919; Act of March 2, 1955, c. 9, § 1(c), (e), 69 Stat. 9, 10. The differential is now $3,000. 28 U.S.C. 135, 213.

[55] As to the status of the Court of Claims, see *supra*, pp. 67–69, and *infra*, pp. 102–106, 108–116, 123–125.

Commerce Court [58] (Chapter Nine), and this Court (Chapter Ten). 36 Stat. 1087–1143, 1146–1160.

vii. In 1914, this Court, for the first time, was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals. Act of August 22, 1914, c. 267, 38 Stat. 703. The Act gave this Court power to review final judgments of that court in cases in which construction of the Constitution or of a treaty was drawn in issue; in addition, the Court was authorized to hear and decide any case pending in the Court of Customs Appeals if the Attorney General, before

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[58] The Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished three years later by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219, was certainly an Article III court. See Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 168–169; Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 912 (fn. 84); 915–916 (1930); *Hallowell* v. *Commons*, 210 Fed. 793, 798 (C.A. 8). The Act creating the court provided that it should be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice for five-year periods from among the circuit judges, except that initially it was to be composed of five additional circuit judges to be appointed by the President (for service during good behavior). The periods of service on the Commerce Court of the five new judges were to be for one, two, three, four, and five years, respectively, in order that the period of designation of one of the new judges should expire in each year thereafter, and so as to permit a system of rotation of assignments of circuit judges to the new court. 36 Stat. 540. The Act abolishing the court provided that nothing in the Act should be "deemed to affect the tenure of" any of the judges then acting as circuit judges by appointment under the Act which created the court. Those judges were to "continue to act under assignment * * * as judges of the district courts and circuit courts of appeals," but on their deaths, resignations, or removals from office their offices were to be abolished and no successors appointed. 38 Stat. 219.

judgment, should certify that the case was of such importance as to make review by this Court expedient. *Ibid.* In 1930, the limitations on the Court's jurisdiction created by the 1914 Act were eliminated (Tariff Act of June 17, 1930, c. 497, § 647, 46 Stat. 762), as a consequence of which the Court has since had general certiorari jurisdiction with respect to customs cases from the Court of Customs Appeals. See 28 U.S.C. 1256. Pursuant to the power thus granted, this Court has heard and determined many cases on certiorari to that court.[57]

viii. On September 14, 1922, the judges of the Court of Customs Appeals were made eligible, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 839. The latter courts were and are Article III courts. *O'Donoghue* v. *United States*, 289 U.S. 516 (rejecting *dictum* to the contrary, see p. 550, in *Ex parte Bakelite Corporation*, 279 U.S. 438, 460). This provision remained in effect until 1958, when it was broadened to include service on any court of appeals or district

[57] See *Five Per Cent. Discount Cases*, 243 U.S. 97; *Nicholas [illegible] Co.* v. *United States*, 249 U.S. 34; *Vitelli & Son* v. *United States*, 250 U.S. 355; *United States* v. *Aetna Explosives Co.*, 256 U.S. 402; *United States* v. *Rice & Co.*, 257 U.S. 536; *United States* v. *Fish*, 268 U.S. 607; *United States* v. *Stone & Downer Co.*, 274 U.S. 225; *Hampton & Co.* v. *United States*, 276 U.S. 394; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48; *United States* v. *Bush & Co.*, 310 U.S. 371; *Barr* v. *United States*, 324 U.S. 83.

court.[58] Judges of the Court of Customs and Patent Appeals are now eligible by statute for service on any court of appeals, any district court, the Court of Claims, and the Customs Court. 28 U.S.C. 293(a), 293(c).

ix. On September 21, 1922, the jurisdiction of the Court of Customs Appeals was enlarged to include appeals, on questions of law only, from findings of the United States Tariff Commission in proceedings relating to unfair practices in the import trade. Tariff Act of September 21, 1922, c. 356, § 316(c), 42 Stat. 858, 943.[59] It is this aspect of its jurisdiction that was involved in *Ex parte Bakelite Corporation,* 279 U.S. 438, see *infra,* pp. 97–102.

x. In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. Act of March 2, 1929, c. 488, §§ 1, 2, 45 Stat. 1475.

The patent jurisdiction of the District of Columbia Court of Appeals transferred by this Act rested on Rev. Stats. 4909, 4911–4914, as amended (35 U.S.C., Compact Ed. [1928 Supp. to 1926 ed.] 57, 59a–62).

[58] 28 U.S.C. (1926, 1934, 1940 eds.) 22; 28 U.S.C. (1946 ed.) 22(a); 28 U.S.C. (1952 ed.) 291(b); Act of August 25, 1958, § 4, 72 Stat. 848.

[59] Now 28 U.S.C. 1543; U.S.C. 1337(c).

Under these provisions, if an applicant for a patent was dissatisfied with the decision of the "board of appeals" in the Patent Office (consisting of the Patent Commissioner and certain other Patent Office officials), he could appeal to the Court of Appeals of the District of Columbia, which was authorized to revise the decision of the board on the basis of the evidence produced in the Patent Office. The court thereafter returned to the commissioner a certificate of its proceedings and its decision, which "govern[ed] the further proceedings in the case." The court's decision did not preclude any interested person from contesting the validity of the patent (if one was granted) in any court wherein it might be called in question. The court's trade-mark jurisdiction was based on Section 9 of the Act of February 20, 1905, c. 592, 33 Stat. 727 (15 U.S.C., Compact Ed., 89), providing that an applicant for the registration or cancellation of a trade-mark (or a party to an interference as to a trade-mark, or one opposing the registration of a trade-mark), if dissatisfied with the decision of the Patent Commissioner, could appeal to the Court of Appeals of the District of Columbia under the same rules of practice and procedure, so far as applicable, as governed in the case of patent appeals. In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, the patent and trade-mark jurisdiction of the District of Columbia Court of Appeals was held to be administrative rather than judicial in nature (see *infra*, pp. 116–121). The patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals now rests on 28 U.S.C. 1542.

cf. Finally, to complete the history, in 1958 (as has been noted) Congress amended 28 U.S.C. 211 (the Code successor to the original creating Act) so as officially to declare the court to be one established under Article III of the Constitution. Act of August 25, 1958, § 1, 72 Stat. 848; *supra*, pp. 66–74.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 211–216, 1541–1543, 2601–2602.

(2). *The congressional purpose to establish the court as an Article III tribunal.*

The conclusion to be drawn from the foregoing summary is, we submit, that it was the congressional purpose, in creating the Court of Customs Appeals, to establish an Article III tribunal. Like the Commerce Court, the tribunal was to be one with limited subject-matter jurisdiction but general geographical jurisdiction—the converse, in this respect, of the regular federal courts, whose jurisdiction over subject matter is general, but whose geographical jurisdiction is limited.

i. The court's subject matter.—The subject matter committed to the new court was federal and judicial in nature. Customs cases arise under the Constitution, federal laws, or treaties, and therefore fall within the judicial power granted by Article III, Section 2, of the Constitution. And there can be no doubt that, on the creation of the court in 1909, its duties were wholly judicial. See *infra*, pp. 108–114.[39]

[39] We show below, at pp. 115–116, that it was not until 1925 that the court was given duties which might be considered non-

ii. The parallel between the language creating the Court of Customs Appeals and that creating the circuit courts of appeals.—The striking parallelism of language between the statute which created the Court of Customs Appeals and that under which the circuit courts of appeals were formed eight years earlier (*supra*, pp. 75–78) indicates that the same source of constitutional authority was invoked by Congress on each occasion. Since the source of power in the case of the circuit courts of appeals was indisputably Article III, there is a clear inference that Article III was also the source of the power Congress exercised in establishing the Court of Customs Appeals.

iii. The eligibility of circuit and district judges to sit on the Court of Customs Appeals.—From the beginning, Congress authorized the President, in the event of one or two vacancies on the court, or the temporary inability or disqualification of one or two judges, to designate any qualified circuit or district judge or judges temporarily to fill the vacancy or vacancies or to act in place of the judge or judges so disabled or disqualified. The same provision was continued under the Judicial Code of 1911 and remained in effect until 1948, when the power of designation was transferred to the Chief Justice and broadened so as to eliminate the limitation of the power of designation to the filling of "one or two" vacancies. It has since been further broadened, so that now all circuit and district judges as well as judges of the Court of Claims and the Customs Court

judicial, and that these additional functions did not change the character of the court.

are statutorily eligible for service by designation on the Court of Customs and Patent Appeals. *Supra*, pp. 78–79. This history affords another striking indication of Congress' understanding that it was creating an Article III court when it established the Court of Customs Appeals.

iv. The tenure of the judges.—We have pointed out the virtually conclusive proof that Congress intended the judges of the court to have life tenure, and the fact that they have actually enjoyed such tenure (see *supra*, pp. 79–81). Since the organic act was silent with respect to tenure, the inference is that Congress understood that tenure during good behavior attached to the offices automatically, by the command of Article III, Section 1, of the Constitution. As remarked by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 199 (1928):

> From what source, may we inquire, were the judges of this court given tenure during good behavior? There can be but one answer. Being an inferior court, created under section 1 of Article III of the Constitution, and, as such, exercising a portion of the judicial powers of the United States, said section, by its express terms, authorized said judges to "hold their offices during good behavior."

Cf. *McAllister* v. *United States*, 141 U.S. 174, 184–186. A student of the field (Katz, *Federal Legislative Courts*, 43 Harv. L. Rev. 894, 909 (1930)) has expressed the view that the absence of a provision as to tenure in the organic act creating the Court of Customs Appeals—

> would seem an almost conclusive indication that Congress assumed that the provisions of Article III of the Constitution would apply to the court and would control the tenure of the judges.

"One may therefore infer," the author concluded, "that Congress believed itself to be acting pursuant to Article III in creating the court." *Ibid.*

v. The carving out of the court's jurisdiction from the jurisdiction of the regular federal courts.—Another relevant factor is that the jurisdiction vested in the Court of Customs Appeals was carved from jurisdiction previously exercised by the regular federal courts—the circuit courts, circuit courts of appeals, and this Court (*supra*, pp. 81–86). See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198. Not only was the new court to exercise exclusive appellate jurisdiction in a class of cases which the regular federal courts had previously heard; in addition, provision was made for the transfer to the new court of cases pending in the circuit courts and circuit courts of appeals on the effective date of the new court's creation, including cases which had been decided by the circuit courts. Thus, the view that Congress established the Court of Customs Appeals as a mere legislative court requires the surprising conclusion that a non-Article III court—pursuant to a statutory scheme specifically authorized by Congress—sat on many occasions during its early years as an appellate tribunal reviewing judgments of Article III courts.

vi. Congress's treatment of the judges of the Court of Customs Appeals as on a par with circuit judges in

matters of salary.—The fact that from the beginning Congress has treated the judges of the Court of Customs Appeals as on a par with circuit judges in matters relating to compensation (*supra*, pp. 86–88) similarly shows its conception of the Court of Customs Appeals and the circuit courts of appeals as equivalent in dignity, and indirectly reflects its understanding of the Article III origin and status of the court. See *O'Donoghue* v. *United States*, 289 U.S. 516, 549.

vii. The eligibility, since 1922, of judges of the Court of Customs Appeals to sit on the superior courts of the District of Columbia.—Since 1922, the judges of the Court of Customs Appeals have been eligible by statute, on designation of the Chief Justice of the United States, for service on the Court of Appeals and Supreme Court (now District Court) of the District of Columbia, both of which are Article III courts (*O'Donoghue* v. *United States*, 289 U.S. 516). *Supra*, pp. 90–91. This eligibility was broadened in 1958 to include service on any court of appeals or district court. *Supra*, pp. 90–91.

(b). *The decision in Ex parte Bakelite Corporation, 279 U.S. 438, should be reexamined and held no longer effective.*

In *Ex parte Bakelite Corporation*, 279 U.S. 438, this Court held in 1929 that the Court of Customs Appeals was a legislative court, created by Congress under its Article I power to lay and collect duties on imports (Art. I, Section 8, Cl. 1), and deriving none of its authority from Article III. We believe that this decision reached an erroneous conclusion on the

basis of mistaken premises and failed adequately to take into account the historical materials we have summarized. For these reasons, and in the light of the intervening authoritative declaration by Congress that it established the court under Article III, we submit that the *Bakelite* decision should be reexamined and held to be no longer effective.

(*1*). The *Bakelite* case arose under the Court of Customs Appeals' jurisdiction (first given it in 1922) to hear appeals on questions of law from findings of the Tariff Commission in proceedings under Section 316 of the Tariff Act of 1922,[61] relating to unfair practices in the import trade. At issue was whether such an appeal involved a justiciable case or controversy within Article III, Section 2, of the Constitution, which in turn was thought to depend on whether the decision was binding on, or merely advisory to, the President. Pursuant to the provisions of Section 316 (see 279 U.S. at 446–447),[62]

[61] Act of September 21, 1922, c. 356, 42 Stat. 858, 943; now, as amended, 19 U.S.C. 1337. The court's jurisdiction derived from subsection (c) of Section 316 (19 U.S.C. 1337(c)). See also 28 U.S.C. 1543.

[62] Briefly, they provided that the President, whenever the existence of unfair methods of competition or unfair acts in the import trade were established to his satisfaction, might affix additional duties on the offending imports or, in extreme cases, exclude them from entry altogether, the President's decision to be "conclusive" (§ 316 (a), (e), 42 Stat. 943–944). "[T]o assist the President", the Tariff Commission was to investigate allegations of unfair practice, conduct hearings, receive evidence, and make findings and recommendations to the President, the findings to be "conclusive" if "supported by evidence", but subject to appeal by the importer to the Court of Customs Appeals, if adverse, on "questions of law

the Bakelite Corporation, a domestic manufacturer, invoked the investigative jurisdiction of the Tariff Commission as against competing importers. The Tariff Commission made findings favorable to Bakelite and recommended that the President exclude from entry the competing products of the importers. The importers appealed to the Court of Customs Appeals. The Bakelite Corporation, by motion to dismiss, challenged the jurisdiction of the court on the ground that no case or controversy within Article III, Section 2, was involved, and that the court, as an inferior

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only" (§ 316 (b), (c)). The judgment of the Court of Customs Appeals was to be "final", subject to review by this Court on certiorari (§ 316(c)). The "final findings" of the Tariff Commission (as revised, if necessary, as a consequence of any appeal that might be taken) were to be "transmitted with the record to the President" for his consideration and action (§ 316(d)).

This Court's certiorari jurisdiction over this class of case was repealed by the Tariff Act of 1930. Act of June 17, 1930, c. 497, § 337(c), 46 Stat. 590, 703 (19 U.S.C. 1337(c)). The Senate Finance Committee's report on the bill which became the 1930 Act indicated that the reason for eliminating this Court's reviewing authority was that the President was not bound by any decision of the courts in the matter; that, as a result of this lack of finality, no "case or controversy" within Article III was presented in the appellate proceedings under the section; and that Congress could not constitutionally give this Court jurisdiction over such proceedings. The committee stated further that the provision for review by the Court of Customs and Patent Appeals was being retained because that court, "being a 'legislative' court and not a 'constitutional' court," might receive this "jurisdiction of a proceeding the judgment in which is merely advisory to discretionary action by the President." This Court's *Bakelite* decision, which had been decided approximately four months prior to the date of the committee report, was, among others, cited by the committee for these views. S. Rept. 37, 71st Cong., 1st sess., p. 67, on H.R. 2667.

court established under Article III, had jurisdiction only of such cases and controversies. The Court of Customs Appeals upheld its jurisdiction and denied the motion to dismiss. *In re Frischer & Co.*, 16 Ct. Cust. App. 191. Although "[b]oth sides to the controversy" conceded the court's Article III status (16 Ct. Cust. App. at 196), the court considered the question at length and held that it had been established under Article III. *Id.*, pp. 196–203. Rejecting, however, the contention that the appeal did not involve a case or controversy within Article III, Section 2, the court sustained its jurisdiction. *Id.*, pp. 203–214.

In this Court, the case began with a petition by the Bakelite Corporation for an original writ of prohibition forbidding the Court of Customs Appeals to entertain the appeal, on the ground that no case or controversy was presented. All parties to this Court—the Bakelite Corporation, the Solicitor General (on behalf of the Court of Customs Appeals), and the importers (intervening by special leave of Court)—were in agreement that the Court of Customs Appeals was an inferior court established under Article III.[63]

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[63] No. 17, Original, Oct. Term, 1928: Motion and Petition for Writ of Prohibition, pp. 21–22; Supplemental Brief on behalf of the Bakelite Corporation, Petitioner, on the Subject of the Constitutional Character of the United States Court of Customs Appeals, pp. 3–28; Brief of Solicitor General on behalf of the United States Court of Customs Appeals, pp. 32–38; Petition and Brief on behalf of Frischer & Co., Inc., et al., for Leave to Intervene, p. 12. The Bakelite Corporation argued the matter at considerable length. See Supplemental Brief, *supra*, filed by leave of Court granted January 14, 1929. The brief of the Solicitor General argued the point at con-

This Court found it unnecessary to reach the merits—whether the appeal to the Court of Customs Appeals involved a case or controversy within Article III—because, it held, the court was not a tribunal established under Article III but a legislative court, "created by Congress in virtue of its power to lay and collect duties on imports." 279 U.S. at 458. The rationale is contained in the following passages of the opinion (279 U.S. at 458, 459):

> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications

siderable but lesser length. The brief of the intervening importers merely acknowledged that all parties to the proceeding conceded the Article III status of the Court of Customs Appeals (p. 12).

> to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings. [Footnotes omitted.]
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> [The argument as to the tenure of the judges] mistakenly assumes that whether a court is of one class or the other depend on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The basic premises of the *Bakelite* opinion, in short, were (a) that a court in which Congress vests jurisdiction it is not required to place in any court is necessarily a legislative tribunal which cannot be established under Article III, and (b) that Congress created the Court of Customs Appeals under Article I, not Article III. In our view, both of these interrelated assumptions were mistaken.

(2). There is no principle requiring Congress to vest in the Article III courts only those matters "which inherently or necessarily require judicial determination", and prohibiting it from requiring Article III judicial determination of matters *capable* of administrative settlement. On the contrary, there are many areas in which Congress can choose to provide either a judicial remedy or an administrative procedure. This was made clear, over a century ago, in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. The question in that case was the

validity of a distress warrant, issued by the solicitor of the Treasury Department against the property of a collector of customs to satisfy a balance owing to the United States arising from a shortage in the collector's accounts. The plaintiff, who challenged the validity of the warrant, contended that its issuance constituted an exercise of the judicial power of the United States and hence was void because not the act of a court ordained and established by Congress under Article III. 18 How. at 275. This Court agreed that "if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void," because "the officers who performed these acts could exercise no part of that judicial power." *Ibid.* The Court held, however, that the actions of the executive officers did not constitute the exercise of judicial power, yet were consistent with due process of law, because Congress, under its plenary power over the customs revenues, had authority to enforce the Treasury's rights against defalcating collectors through exclusively executive processes. P. 281. The Court "d[id] not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted" (*ibid.*), but held that provision for such judicial action was not constitutionally required. The Court then said (18 How. at 284):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which,

from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. *At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* * * * [Emphasis added.] [64]

See, to the same effect, *Fong Yue Ting v. United States*, 149 U.S. 698, 715, where this language was quoted in sustaining a statute providing for the judicial deportation of aliens found unlawfully within the country, the Court pointing out that Congress could have committed the subject entirely to executive officers (pp. 713–714, 728).

The practice of many decades gives firm support to this principle. As we have pointed out (*supra*, pp. 81–86, 96), prior to the establishment of the Court of Customs Appeals, the jurisdiction vested in that court had been exercised by the regular federal courts—following a period of purely executive determination. A substantial part of the present business of the federal district courts consists of matters which Congress could clearly commit to executive or adminis-

[64] The "courts of the United States" referred to in the quoted passage, and throughout the opinion, were the regular federal courts, and it was assumed that those courts would be exercising their normal Article III powers.

trative determination but has chosen to bring "within the cognizance of the courts of the United States", *e.g.*, money, contract, and tort claims against the government. Conversely, a number of present-day administrative tribunals carry on functions which could be, and have in the past been, vested in Article III courts. In some instances, too, the courts and administrative agencies now have concurrent or coordinate jurisdiction. For example, both the Federal Trade Commission and the courts (at the instance of the Department of Justice) enforce certain provisions of the Clayton Act.[35] In sum, the history of the federal courts and of federal agencies disproves the fundamental postulate on which the *Bakelite* opinion rests.

In addition, the jurisprudence of this Court gives no support—aside from the two cases following on the heels of *Bakelite* (*Williams* v. *United States*, 289 U.S. 553, and *O'Donoghue* v. *United States*, 289 U.S. 516)—to that primary premise that only legislative courts can "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." 279 U.S. at 451. None of the decisions cited to sustain this part of the *Bakelite* opinion suggests that proposition. In most of the cases, the tribunals involved, or about which the opinions spoke, were the regular federal courts, whose

[35] See also, *e.g.*, *Far East Conference* v. *United States*, 342 U.S. 570; *Maritime Board* v. *Isbrandtsen*, 356 U.S. 481; *Maryland and Virginia Milk Producers Assoc., Inc.* v. *United States*, 362 U.S. 458; *United States* v. *Radio Corp. of America*, 358 U.S. 334.

Article III status was and is unquestioned.[66] No attempt was made in the *Bakelite* opinion to reconcile its holding with these earlier decisions, which assumed the Article III status of those courts to which were submitted various matters not *requiring* judicial determination (though susceptible of it). And in the most recent case on legislative tribunals, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, each of the four opinions (expressing various views) rejected, explicitly or implicitly, the notion that Article III courts are barred from considering matters not "inherently or necessarily" *requiring* "judicial determination".

(*3*). The second major premise of the *Bakelite* opinion—that Congress created the Court of Customs Appeals under Article I, not under Article III—is equally untenable. We have just shown that the susceptibility of customs claims to executive determination did not bar Congress from placing the decision of these cases in an Article III court. The history we have detailed above at pp. 75–97, shows that Congress thought and assumed that it was acting to create a special inferior court under Article III.[67] The

[66] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 275, 280–285; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *Auffmordt* v. *Hedden*, 137 U.S. 310, 329; *In re Fassett*, 142 U.S. 479, 486–487; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659–660; *Passavant* v. *United States*, 148 U.S. 214, 218–219; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714–715, 727–732.

[67] The *Bakelite* opinion states that whether a court is legislative or constitutional does not depend upon "the intention of Congress" (279 U.S. at 459), but this means only that Congress's *characterization* of a court *as legislative or constitutional*

creation of such a special Article III court to exercise a particular type of jurisdiction is not at all foreign to our history." And, finally, we show below, at pp. 108–125, that no constitutional obstacle prevented Congress from acting under Article III: the original jurisdiction of the court is plainly within the "judicial power" granted by Article III, and its later-acquired jurisdiction did not divest it of Article III status.

(4). Our analysis of the *Bakelite* holding and rationale has thus far taken no account of the 1958 declaration by Congress that the Court of Customs and Patent Appeals was in fact established under Article III of the Constitution. See *supra*, pp. 66–74. Implicit in that declaration was the view of Congress that this Court, in *Ex parte Bakelite*, had misread the congressional purpose in establishing the court,

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is not controlling. This Court did not say that it was irrelevant what *power* Congress considered itself to be exercising. On the contrary, the same sentence of the *Bakelite* opinion declares that "the true test lies in the *power under which the court was created* and in the jurisdiction conferred" (emphasis added).

[56] Cf. the Emergency Court of Appeals, created by Section 204(c) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 31, 32 (50 U.S.C. App. 924(c)) (orders and price schedules of the former Office of Price Administration), and the former Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219 (orders of the Interstate Commerce Commission). The Commerce Court was a constitutional court. See *supra*, p. 89, fn. 56. The Emergency Court of Appeals, at present inactive, though its life has not been formally terminated, consisted of three or more district or circuit judges designated by the Chief Justice. It was likewise a constitutional court. In our view, the Court of Claims and Customs Court are also Article III courts. See *supra*, 67 ff., 102–106, *infra*, pp. 108–116, 123–125.

and had erroneously characterized it as legislative. Whatever doubt might remain as to the soundness or unsoundness of the *Bakelite* decision, apart from the 1958 declaration, ought now to be resolved, we submit, in favor of the correctness of the congressional conclusion—*i.e.*, that *Bakelite* mistakenly construed the effect and intent of Congress's action in establishing the court. It needs no argument that this Court should accord great weight to a formal declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the tribunal into being. Particularly should this be so where the relevant history points directly to the conclusion that Congress actually created the Court of Customs and Patent Appeals in an exercise of its Article III authority—just as, in 1958, it said it did.

3. *There is no constitutional obstacle to the conclusion that the Court of Customs and Patent Appeals was validly established by Congress under Article III.*

(*a*). *The customs jurisdiction of the court has always been purely judicial in character, involving cases arising under the Constitution, laws, and treaties of the United States, and controversies to which the United States is a party.*

(*1*). *"Cases" and "controversies."*—The sole jurisdiction of the Court of Customs Appeals at the time of its creation in 1909, and during the first thirteen years of its existence, was the hearing of appeals (both as to law and fact), at the instance of importers or of the customs collectors, from final decisions of the Board of General Appraisers (now the United States Customs Court) in classification and rate-of-

duty cases arising under the customs laws of the United States, including questions relating to fees and charges and to the jurisdiction of the Board, and "all appealable questions as to the laws and regulations governing the collection of the customs revenues." § 29, 7th par., of the Customs Administration Act of 1890, c. 407, 26 Stat. 131, as amended by the Payne-Aldrich Tariff Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 106; Appendix A, *infra*, pp. 132–133. See *supra*, pp. 81–86.[*] Its judgments in all such cases were, and are, "final". *Ibid.*; 28 U.S.C. 2601. Its customs decisions, thus, were and have always been beyond revision by either Congress or the Executive. Indeed, as we have noted (*supra*, pp. 82, 89–90), they were not even reviewable by this Court during the first five years of the lower court's existence.

Thus, there can be no doubt that the jurisdiction of the Court of Customs Appeals, from the time of its establishment in 1909 until the enactment of the Tariff Act of 1922 (see *supra*, pp. 91, 98–101), consisted exclusively of "cases", within the meaning of Article III, Section 2 of the Constitution. *Hayburn's Case*, 2 Dall. 409; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819; *United States* v. *Ferreira*, 13 How. 40, 46–50; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284; *Gordon* v. *United States*, 117 U.S. 697; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 487; *Muskrat* v. *United States*, 219 U.S. 346; *Tutun* v. *United States*, 270 U.S. 568, 576–

[*] Of course, the court still retains this jurisdiction (28 U.S.C. 1541), to which other powers have since been added. 28 U.S.C. 1542, 1543.

577. As observed by the Court of Customs Appeals itself in *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928):

> [I]n the creation and establishment of this court no jurisdiction was given to it except in "cases." In its original creation it was not within the contemplation of its creators to confer upon it jurisdiction to try administrative questions or matters not embraced within the terms of section 2 of Article III. Every case given to it *arises* under "the laws of the United States." * * * [Emphasis in the original.]

That the court's exclusive initial jurisdiction extended to "cases" in the constitutional sense is further shown by the fact that this jurisdiction was carved from authority previously exercised by the regular federal courts (*supra*, pp. 81-86, 96) and that this Court has on many occasions, since it was first given the power to do so in 1914, reviewed customs judgments of the Court of Customs Appeals on writ of certiorari. See cases cited *supra*, p. 90, fn. 57. That this Court has granted review in these cases confirms their judicial character, since the Court has always refused to hear, on the ground that it lacks the power to do so, matters which did not present a "case" or "controversy" within the scope of Article III. See cases cited *supra*, p. 109; also, *Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-701.

(2). *"Arising under this Constitution, the Laws of the United States, and Treaties".*—There can also be no doubt that the "cases" with which the court deals,

in its customs jurisdiction arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—within the terms of Article III, Section 2. The various customs statutes and regulations, as well as the foreign treaties bearing on customs problems—the substantive law applied by the court—are exclusively federal. The *Bakelite* opinion did not intimate any other view, and the rationale of the opinions in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, confirms it (see, *e.g.*, 337 U.S. at 610, 611–615, 641–2 (fn. 20–21), 643, 649, 652).[20]

(2). "*Controversies to which the United States shall be a Party*". The cases within the original jurisdiction of the Court of Customs Appeals also fall under a second of the categories of cases and controversies defined in the second section of Article III, *viz.*, "Controversies to which the United States shall be a Party." See Brown, *The Rent in Our Judicial Armor*, 10 Geo.

[20] We add that, for the reasons given in the text, the jurisdiction of the Court of Claims, as well as of the District Courts under the Tucker Act and Federal Tort Claims Act, likewise rests on the clause of Article III, Section 2, relating to cases arising under the Constitution and laws of the United States, as well as the subsequent clause relating to controversies to which the United States is a party (discussed *infra*, pp. 114–114). Such cases all have a federal genesis and their subject matter is always federal in origin. Accordingly, they fall within the constitutional category of cases "arising under this Constitution, the Laws of the United States; * * *." See the discussion to this effect in the opinions of Mr. Chief Justice Vinson, Mr. Justice Frankfurter, and Mr. Justice Rutledge in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–2 (fns. 20–21), 649, 652. See also *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455.

Wash. L. Rev. 127, 136 (1941). In the proceedings before the Board of General Appraisers, the United States was the party defendant.[1] In the Court of Customs Appeals, the United States was appellant or appellee, depending on which way the decision of the Board of General Appraisers went. In *Williams* v. *United States*, 289 U.S. 553, 571–580, this Court construed the phrase "Controversies to which the United States shall be a Party" as embracing only controversies to which the United States is a party *plaintiff*. (In so doing, it found it necessary to overrule prior statements that, though the United States could "not be sued without its consent yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy." *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386; see also *Kansas* v. *United States*, 204 U.S. 331, 342.) In *Pope* v. *United States*, 323 U.S. 1, the government urged that the interpretation placed upon the constitutional phrase by the *Williams* case was the consequence of "faulty analysis and the failure of the Court to have the pertinent constitutional history before it." Brief for the United States, No. 26, Oct. Term, 1944, p. 87. The historical materials bearing upon the intent of the framers were examined in detail. *Id.*, pp. 86–101.[2] We adhere to that position, and summarize it immediately below.

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[1] Its consent to be sued was given by the Customs Administrative Act of 1890, c. 407, § 14, 26 Stat. 131, 137; and see the same section of that Act as amended by the Payne-Aldrich Act of 1909, c. 6, § 28, 36 Stat. 11, 91, 100; see also Appendix B, *infra*, pp. 137–138.

[2] The Court found it unnecessary to reach the question. 323 U.S. at 13.

For the full-scale argument, the Court is respectfully referred to the government's brief in the *Pope* case.

The conclusion of the *Williams* case, concededly contrary to the literal meaning of the constitutional language ("Controversies to which the United States shall be a Party"), was based upon an historical analysis designed to show that the immunity of the sovereign from suit precluded the application of the phrase to suits *against* the government. More complete historical research has shown no intention to withhold from the federal courts jurisdiction over claims against the government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that, where such consent has been given, a suit against the government is not a "Controversy] to which the United States shall be a Party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Virginia, Delaware, Maryland, Georgia, North Carolina, Connecticut, and New Jersey had all submitted to judicial determination controversies involving the government. Hamilton, in *The Federalist*, No. 81, specifically recognized that a sovereign may be sued if it consents. See *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 324. Moreover, it is significant that, in the Virginia debates on the Constitution, both Madison and Marshall expressly acknowledged that, if a state con-

sents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State * * * and foreign States * * *". See *Principality of Mônaco* v. *Mississippi*, 292 U.S. 313, 323–324. There is no reason to believe that the parallel clause providing jurisdiction where the United States is a party had a narrower scope. The framers would not have granted the federal courts jurisdiction of suits against sovereign states (if they consented to be sued) but at the same time deprived the federal courts of jurisdiction against the United States (if it consented to be sued).[73] And the historical fact is that, less than three years after the adoption of the Constitution, the Justices of this Court assumed that the inferior courts of the United States could act on claims against the government if the judicial action were made final and placed beyond executive or legislative revision (*Hayburn's Case*, 2 Dall. 409; see *United States* v. *Ferreira*, 13 How. 40).[74]

(*b*). *The subsequent vesting in the court of jurisdiction over matters which may not constitute "cases"*

[73] The scope and meaning of the clause extending federal judicial power to "Controversies to which the United States shall be a Party" is discussed to some extent in the opinions of Mr. Chief Justice Vinson and Mr. Justice Rutledge in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–2 (fns. 20–21).

[74] It goes without saying that, if the customs jurisdiction of the Court of Customs and Patent Appeals can rest on the "United States" clause of Article III, Section 2, the same is true of the jurisdiction of the Court of Claims and the Customs Court.

within Article III, Section 2, did not affect its Article III status.

(*1*). It was not until 1922, thirteen years after its creation, that the Court of Customs Appeals was first vested with jurisdiction over a matter which may not have involved the adjudication of a case or controversy within the scope of Article III, Section 2. This was the power, conferred by Section 316 of the Tariff Act of 1922, 42 Stat. 943, to hear appeals from findings of the Tariff Commission (on questions of law only) in proceedings relating to unfair practices in the import trade. *Supra*, pp. 91, 98–102. Whether such an appeal presented a case or controversy was the issue on the merits in the *Bakelite* case, 279 U.S. 438, which this Court found it unnecessary to determine in view of its ruling that the Court of Customs Appeals was a legislative tribunal and, as such, could lawfully be vested with power to hear matters other than cases or controversies. *Supra*, pp. 98–102. The Court of Customs Appeals, it will be recalled, had determined that such an appeal *did* present a case or controversy. *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 203–214 (1928); see *supra*, p. 100.[75]

Regardless, however, of whether these appeals from the Tariff Commission present justiciable cases within the sense of Article III,[76] the conferring of such juris-

[75] See, however, fn. 62, *supra* pp. 98–99, 2d par., where it is noted that the Senate Finance Committee, in 1929, was of the view that an appeal from the Tariff Commission's findings did not present a case or controversy.

[76] This aspect of the court's jurisdiction has constituted a very minor part of its total business. See Brown, *The Rent*

diction could not have affected the Article III character and status of the court if, as we have argued, it had that status previously. If the court was created as an Article III tribunal, the attempted vesting by Congress of inconsistent powers could not have altered its character. At most, the attempt to grant such authority would have been ineffectual, as the petitioner in *Ex parte Bakelite* had argued to this Court (*supra*, pp. 99–100).[77] See *Pope* v. *United States*, 323 U.S. 1, 13. But for the reasons discussed below, at pp. 121–125, we do not believe that the vesting of this additional jurisdiction—even assuming its non-justiciable character—was inconsistent with the court's Article III status.

(*2*). In 1929, the patent and trade-mark jurisdiction of the Court of Appeals of the District of Columbia was transferred to the Court of Customs Appeals and the name of the court was changed to the Court of Customs and Patent Appeals. *Supra*, pp. 91–92. This category constitutes the second of the two major classes of jurisdiction currently exercised by the court.

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in Our Judicial Armor, 10 Geo. Wash. L. Rev. 127, 135 (1941). Only five such cases have been before the court in its history: *In re Frischer & Co.*, 16 Ct. Cust. App. 191 (1928) (see also *Frischer & Co.* v. *United States*, 17 C.C.P.A. 494 (1930) (the same case, on the merits, following the *Bakelite* decision)); *In re Orion Co.*, 22 C.C.P.A. 149, 71 F. 2d 458 (1934); *In re Northern Pigment Co.*, 22 C.C.P.A. 166, 71 F. 2d 447 (1934); *In re Amtorg Corp.*, 22 C.C.P.A. 558, 75 F. 2d 826 (1935); *In re Von Clemm*, 43 C.C.P.A. (Customs) 56, 229 F. 2d 441 (1956).

[77] Similarly, in the case of the Court of Claims, if (as we have suggested, *supra*, pp. 67 ff, 102–106, 107 (fn. 68), 108–116) that tribunal was established as a constitutional court (and *Williams* v. *United States*, 289 U.S. 553, was wrongly decided), and if it be thought that a constitutional court cannot have advisory

In *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, decided two years prior to this transfer, this Court held that the patent and trade-mark powers of the District of Columbia Court of Appeals involved the rendering of "mere administrative decision[s]"—in the nature of "instruction[s] to the Commissioner of Patents"—by "a court which is made part of the machinery of the Patent Office for administrative purposes," with the consequence that the court's decisions were not "judicial judgments" within the meaning of Article III, Section 2. 272 U.S. at 698-699. "Neither the opinion nor decision of the Court of Appeals under § 4914 R.S. [patents], or § 9 of the Act of 1905 [Act of February 20, 1905, c. 592, 33 Stat. 727, assimilating the rules governing trade-mark appeals to those obtaining in patent appeals]," the Court said (272 U.S. at 699)—

> precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this Court, which can only review judicial judgments. * * *[78]

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functions like the congressional reference jurisdiction of the Court of Claims, then it would follow that the congressional reference jurisdiction (which was added in the 1880's) was invalidly conferred—not that the Court of Claims was a legislative court. We suggest below (fn. 85, *infra*, p. 125) that the judges of the Court of Claims may be acting as commissioners in reporting to Congress in legislative reference cases.

[78] This Court did not question the power of the District of Columbia Court of Appeals to hear such cases, but stated that it derived its authority in this respect from Article I of the Constitution rather than Article III. 272 U.S. at 700. The opinion referred to the power of Congress under Article I, Section 8, clause 17 (giving Congress the exclusive authority to

The Court did not mention in the *Postum Cereal* opinion an earlier decision, *United States* v. *Duell*, 172 U.S. 576, 586–589 (decided at a time when the legislation with respect to patent and trade-mark appeals differed in no material respect from that in effect at the time of the *Postum Cereal* ruling [79]), in which Chief Justice [redacted], for a unanimous Court, stressed the essentially judicial nature of the process of issuing patents and settling controversies in patent interference proceedings and the binding effect of the Court of Appeals' decision on the Patent Office in such proceedings.[80] In particular, the *Duell* opinion noted that the court's decision was "none the less a judgment" because its effect was to aid an administrative body in the performance of duties imposed upon it by Congress. 172 U.S. at 588. See also the later patent law decision in *Hoover Company* v. *Coe*, 325 U.S. 79; and such rulings as *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162 (cases in which courts have given rulings on legal issues, binding on administrative officials but not necessarily govern the District of Columbia) to clothe the courts of the District with administrative and legislative as well as judicial functions. See *infra*, pp. 121–125.

[79] The provision of Rev. Stats. § 4914 declaring that no decision of the court in a patent appeal case would preclude any person from the right to contest the validity of any patent that might be issued as a consequence of such appeal in any court in which the same might be called in question—referred to by the Court in the *Postum Cereal* case (*supra*, p. 117)—was in effect at the time of the *Duell* decision, and was referred to in a passage of an earlier opinion (*Butterworth* v. *Hoe*, 112 U.S. 50, 60) which the *Duell* opinion quoted. 172 U.S. at 587.

[80] See Rev. Stats. § 4914, providing that the decision of the court "shall govern the further proceedings in the case." This provision was in effect when the *Postum Cereal* case was decided, and is still the law. 35 U.S.C. 144.

controlling their ultimate action). See also the federal extradition procedure under which the judge certifies his conclusions to the Secretary of State but the latter is not bound to extradite as a result of the judicial certification. 18 U.S.C. 3184, 3186.

In addition, it should be noted that, under the law in effect at the time of the *Postum Cereal* decision, if an application for a patent was refused, either by the Commissioner of Patents or by the Court of Appeals of the District of Columbia upon appeal from the commissioner, the applicant might seek to have his right to a patent adjudicated by a bill in equity. Rev. Stats., § 4915 (35 U.S.C. [1926 ed.] 63). Two months following the *Postum Cereal* decision, the law was amended so as to compel an unsuccessful applicant in the Patent Office to elect between his right of appeal to the District of Columbia Court of Appeals and his remedy in equity. Act of March 2, 1927, c. 273, § 8, 44 Stat. (Part 2) 1336 (35 U.S.C., Compact Ed., [1928 Supp. to 1926 ed.] 59a). If a party to a patent interference proceeding was dissatisfied with the decision of the Patent Office board of appeals and appealed to the District Court of Appeals, an adverse party might, under the amendment, notify the Commissioner of Patents that he elected to have all further proceedings conducted under Rev. Stats. § 4915, in which event the appeal to the Court of Appeals was to be dismissed. *Ibid.*[31] These provi-

[31] The Senate Committee on Patents, in reporting out the bill effecting these amendments, explained that, under then-existing law, "an applicant whose case has been rejected or a losing party in an interference may appeal to the Court of Appeals of the District of Columbia and then if he is dissatisfied he may start proceedings de novo by filing a bill in equity in a United

sions were in effect at the time of the transfer of the patent and trade-mark jurisdiction to the Court of Customs Appeals, and remain in effect at the present time. 35 U.S.C. 141, 145, 146.

Moreover, the fact that the decision of the District of Columbia Court of Appeals did not preclude any interested person from contesting the validity of the patent or trade-mark (if one was granted) in any court in which it might be called in question—the reason assigned in the *Postum Cereal* opinion for the non-judicial character of the Court of Appeals' decision—would not appear to be a sound basis for that conclusion. The right to contest the validity of a patent or trade-mark existed even if the patent or trade-mark was issued pursuant to the procedure by bill in equity, which Rev. Stats. § 4915 (35 U.S.C. [1926 ed.] 63; now 35 U.S.C. 145) made available to an unsuccessful applicant as an alternative to his remedy by appeal to the District Court of Appeals (see *supra*, pp. 119–120). See Reviser's Note 35 U.S.C. 144. The latter section is the modern counterpart of Rev. Stats. § 4914, the provision of the former law which contained the "non-preclusion" clause. That clause has been omitted from 35 U.S.C. 144 "as superfluous" because, the Reviser's Note explains, "such a sentence does not appear in the present civil action [the present name

States district court, under section 4915 [of the Revised Statutes], and from the decision of that court he may appeal to the court of appeals. This procedure makes for very vexatious delays and the object of the present bill is to permit one to have the decision of the Patent Office reviewed either by the court of appeals or by filing a bill in equity, but not both." S. Rept. 1313, 69th Cong., 2d sess., p. 4, to accompany S. 4812. See also, to the same effect, H. Rept. 1889, 69th Cong., 2d sess., pp. 2–3 to accompany H.R. 13487, a similar bill.

for the former remedy by bill in equity] section, 35 U.S.C. 63 [now 35 U.S.C. 145] and in either case the validity of the patent may be questioned." Since the remedy by bill in equity was unquestionably judicial (see *Hoover Co.* v. *Coe*, 325 U.S. 79), notwithstanding that a patent issued under that procedure might later be challenged in any court, the mere fact that a patent issued pursuant to the alternative procedure of appeal to the Court of Appeals could later be challenged would not appear to constitute a basis, in itself, for holding the appeal procedure non-judicial. Cf. *Hoover Co.* v. *Coe*, *supra*.

(3). Even if one accepts the *Postum Cereal* decision as having settled the non-Article III character of the patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals, the transfer to it of that jurisdiction was not inconsistent with its Article III status.

O'Donoghue v. *United States*, 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not strictly judicial in character is compatible with its status as a tribunal ordained and established under Article III. 289 U.S. at 545–548, 550–551. The *O'Donoghue* case held that the superior courts of the District of Columbia were established by Congress pursuant to its court-creating authority under Article III, with the consequence that the judges of those courts enjoy the immunity guaranteed by that article against diminution of their compensation during their continuance in office. 289 U.S. at 551. At the same time, the Court recognized the authority of Congress, acting under its plenary power to legislate for the District of Columbia (Art.

I, § 8, clause 17), to vest in the courts of the District, in addition to their Article III judicial functions, administrative and even legislative powers,[82] which could not have had their source in Article III. 289 U.S. at 545–548, 550–551.

We submit that the rationale of the *O'Donoghue* case is also applicable to the Court of Customs and Patent Appeals with respect to its patent and trade-mark jurisdiction.[83] For one thing, that court, like the courts of the District, is located at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the ordinary courts of the District, constitutionally vest similar powers in the Court of Customs and Patent Appeals, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept, since the patent and trade-mark jurisdiction did actually come from the Court of Appeals for the District (*supra*, pp. 91–92, 116–121). There would appear to be no constitutional objection to carving out

[82] *See, e.g., Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 440–443 (rate making); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 698–701 (patent and trade-mark appeals); *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467–468 (radio station licensing; cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 274–278); see also D.C. Code, § 31-101 (authorizing District Court judges to appoint members of the Board of Education).

[83] It would also be applicable—assuming the non-judicial character of the court's appellate function in proceedings before the Tariff Commission relating to unfair competitive practices (see *supra*, pp. 115–116)—to that phase of its jurisdiction.

part of the accepted jurisdiction of the District Court of Appeals and assigning it to another such constitutional court. Congress has limited neither the judicial nor the non-judicial functions of the Court of Appeals to local matters related to the District, and this Court has never intimated that the non-judicial functions of that court must be confined to District matters. The authority of Article I, Section 8, clause 17, has been held sufficient basis for imposing general federal functions, non-judicial in character, on the Court of Appeals. It should suffice, too, for another appellate court within the District. It is true that the Court of Customs and Patent Appeals is national in scope and not limited by statute to sitting in Washington (28 U.S.C. 214), although the District is the official station of the judges (28 U.S.C. 456). But the congressional power relating to the District of Columbia is also national in scope and may be exercised beyond the confines of the District. See *Cohens* v. *Virginia*, 6 Wheat. 264, 424, 425, 428–9; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600–602 (opinion of Jackson, J.).

Furthermore, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Customs and Patent Appeals. The patent, commerce, and customs duties clauses of Article I, Section 8 (clauses 1, 3, and 8)—granting authority to legislate generally in the field of patents, trade-marks, and customs—sustain the establishment of such non-judicial machinery. The problem is, of course, the joinder of these functions with the court's judicial responsibilities stemming from Article III. In the past, this Court

and individual Justices have rejected, in general terms, the exercise by federal constitutional courts, other than the District of Columbia courts, of non-judicial functions. See, *e.g.*, *Ex parte Bakelite*, 279 U.S. 438, 454; *O'Donoghue* v. *United States*, 289 U.S. 516, 546–7, 551; *Williams* v. *United States*, 289 U.S. 553, 569; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582. Theoretically it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I. But the Court's concern for the nationwide federal court system prompts the thought that there well may be a difference, with respect to joinder of non-judicial functions, between this Court and the regular federal courts in the states, on the one hand, and special constitutional courts established for special purposes, on the other. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment[34]—mainly the fear of unloosing upon those courts a mass of duties foreign to their role as judges—apply with less force to the specialized tribunals with their limited functions and areas of responsibility (particularly the specialized courts determining issues between citizens and their government). The analogy of the District of Columbia courts indicates that, so long as these specialized courts are primarily endowed with judicial power under Article III, the addition of certain non-judicial functions is valid and does not destroy the Article III character of the court. Many

[34] See, *e.g.*, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 590–1, 616, 628–9, 648–9.

so-called "administrative" functions, like the patent and trade-mark duties of the Court of Customs and Patent Appeals, are close kin to normal judicial responsibilities (see *supra*, pp. 116–124)—separated by, at most, a thin line. See, particularly, *Hoover Co.* v. *Coe*, 325 U.S. 79, 83–84, 87–88. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and decision-making non-judicial functions of this kind, but must instead create a totally separate body for the non-judicial or non-Article III responsibilities. Properly applied, the principle of the separation of powers does not compel that result.

There is some authority for the proposition that even judges of the regular federal courts may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the Government, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as "commissioners" and not as a court. Subsequently the judges of some district courts did act in such capacity. See *United States* v. *Ferreira*, 13 How. 40; see also the note concerning the unreported 1794 case, *of United States* v. *Yale Todd*, appended to the report of the *Ferreira* case (p. 51). The judges of the Court of Claims have said that they assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Seaborn* v. *United States*, 27 C. Cls. 485, 490; mandamus to permit appeal denied, *In re Seaborn*, 148 U.S. 232. Cf. *Zadik* v. *United States*, 124 C. Cls. 650.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed or, in the alternative, since petitioner must lose on the merits even if the court erred in denying leave to appeal, that the judgment of conviction should be affirmed.[38]

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[38] See *Pollard* v. *United States*, 352 U. S. 354, 363.

APPENDIX A

Statutes Involved

28 U.S.C. 1915:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other

cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

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28 U.S.C. 211:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

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28 U.S.C. 294:

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his

court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned.

The Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 105–108, amended the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, and added a new section, 29, which provided (36 Stat. 105–108):

SEC. 29. That a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President,

by and with the advice and consent of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with jurisdiction as hereinafter established and limited.

[2d par.] Said court shall prescribe the form and style of its seal and the form of its writs and other process and procedure and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal at a salary of three thousand dollars per annum, to be appointed by and hold office during the pleasure of said court; said services outside the District of Columbia to be performed by the United States marshals in and for the districts where sessions of said court may be held, and to this end said marshals shall be the marshals of said Court of Customs Appeals. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be four thousand dollars per annum, which sum shall be in full payment for all service rendered by such clerk, and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said

court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided,* That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States. The court shall have power to establish all rules and regulations for the conduct of the business of the court and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law.

[3d par.] The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held by the said court, in the several judicial circuits, and at such places as said court may from time to time designate.

[4th par.] The presiding judge of said court shall be so designated in [the] order of appointment and in the commission issued him by the President, and the associate judges shall have precedence according to the date of their commissions. Any three of the members of said court shall constitute a quorum, and the concurrence of three members of said court shall be necessary to any decision thereof.

[5th par.] The said court shall organize and open for the transaction of business in the city of Washington, District of Columbia, within ninety days after the judges, or a majority of them, shall have qualified.

[6th par.] After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all

appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this Act: *Provided,* That nothing in this Act shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after the passage of this Act: *And provided further,* That all customs cases heretofore decided by a circuit or district court of the United States or a court of a Territory of the United States and which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed.

[7th par.] The Court of Customs Appeals established by this Act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs

revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases.

[8th par.] Any judge who, in pursuance of the provisions of this Act, shall attend a session of the Court of Customs Appeals held at any place other than the city of Washington, District of Columbia, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him, and such payments shall be allowed the marshal in the statement of his accounts with the United States.

[9th par.] The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney-General of the United States and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided, however,* That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts; and in no case shall said marshals secure other rooms than those regularly occupied by existing circuit courts of appeals, circuit courts, or district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

[10th par.] If the importer, owner, consignee, or agent of any imported merchandise,

or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of said statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

[11th par.] Immediately upon the organization of the Court of Customs Appeals all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be

certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

[12th par.] That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States, may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified to so act.

[13th par.] Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

[14th par.] Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendars shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days.

[15th par.] In addition to the clerk of said court the court may appoint an assistant clerk at a salary of two thousand five hundred dollars per annum, five stenographic clerks at a salary of two thousand four hundred dollars per annum each, and one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of nine hundred dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the

pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct. The marshal of said court for the District of Columbia is hereby authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery as may be necessary for the use of said court, and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

APPENDIX B

Creation and History of the Board of General Appraisers (Now the United States Customs Court)

The Board of General Appraisers, the predecessor of the present United States Customs Court, was created by Section 12 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, 136. As amended by the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, § 28, 36 Stat. 11, 91, 98–99 (the Act which created the Court of Customs Appeals), Section 12 provided for the appointment by the President, by and with the advice and consent of the Senate, of nine "general appraisers of merchandise", at salaries of $9,000 per annum. The Board sat at times as a board of nine, at times in panels of three members each (denominated Board 1, Board 2, and Board 3), and at times through its individual members. The President had authority to designate one member of the Board as "president" of the Board, and others to act in his absence. The Board had power to establish rules of evidence, practice, and procedure for the conduct of its business, and it (and each member) had "all the powers of a circuit court of the United States" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt. *Ibid.* (36 Stat. 98–99).

The Board's principal function was to hear and determine appeals by importers from decisions of the collectors of customs as to the "rate and amount of duties chargeable upon imported merchandise, includ-

ing all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)." § 14, as amended, 36 Stat. 100. The Board's decisions in these so-called "classification" cases were "final and conclusive upon all persons interested therein", subject only to appeal to the Court of Customs Appeals. *Ibid.* In addition, the Board heard and determined appeals by importers or the collectors of customs from decisions of "appraisers" (executive officials stationed at the several ports) as to the value of imported goods. § 13, as amended, 36 Stat. 99–100. In these so-called "reappraisement" cases, the decision of the Board was absolutely final ("* * * shall not be subject to review in any manner for any cause in any tribunal or court * * *"). *Ibid.*[1]

Members of the Board held office "during good behavior," subject, however, to removal by the President, "after due hearing", "for the following causes, and no other: Neglect of duty, malfeasance in office, or inefficiency." § 12, as amended, 36 Stat. 98. (As originally established in 1890, members of the Board were removable by the President "at any time" for any of the three stated causes. § 12, 26 Stat. 136.[2]

[1] In 1930, appeals (to the Court of Customs and Patent Appeals) from decisions of the Customs Court (the successor of the Board of General Appraisers) in reappraisement cases, on "questions of law only", were authorized for the first time. Tariff Act of June 17, 1930, c. 497, § 501, 46 Stat. 590, 730. See 28 U.S.C. 2637.

[2] In addition, under the original Act of 1890, members of the Board were authorized to exercise (in addition to their judicial functions in reappraisement and classification cases) such supervisory functions over appraisements and classifications, "under the general direction of the Secretary of the Treasury", as might be needful to secure lawful and uniform appraisements and classifications at the several ports. § 12, 26 Stat. 136. The latter provision (among others) was elimi-

The Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, amended the 1890 Act so as to provide that all members of the Board (those theretofore and those thereafter appointed) should serve "during good behavior," retaining, however, the President's power of removal for any of the three stated causes, but adding the requirement that removal be only "after due hearing." [1]

In 1926, the name of the Board was changed to the "United States Customs Court," and the titles of its members to the "chief justice" and "associate justices," without, however, any change in its powers, duties, or membership. Act of May 28, 1926, c. 411, 44 Stat. (Part 2) 669. The legislative history of this Act indicates that its purpose was to make the Board, which had repeatedly been held by the courts to be essentially a judicial tribunal,[2] a court in name as well

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[1] nated from Section 12 by the amendatory Act of 1906, 34 Stat. 98–99.

[2] The Board's "powers of a circuit court" in preserving order, compelling the attendance of witnesses and the production of evidence, and punishing for contempt (see *supra*, p. 137) were also first conferred by the 1908 Act (§ 3, 35 Stat. 406). Previously, the Board's powers of compulsory process were more limited (penalty of $100 for failure to comply). § 17 of the 1890 Act, 26 Stat. 139.

[3] See *In re Van Blankensteyn*, 56 Fed. 171, 177 (C.A. 2, 1892); *Marine* v. *Lyon*, 65 Fed. 992, 994 (C.A. 1, 1895); *Stone* v. *Whitridge, White & Co.*, 129 Fed. 33, 36 (C.A. 1, 1904), reversed on other grounds *sub nom. United States* v. *Whitridge*, 197 U.S. 135; *United States* v. *Kurtz*, 5 Ct. Cust. App. 144, 146 (1914); *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. App. 373 (1914); *Yee Chong Yung & Co.* v. *United States*, 11 Ct. Cust. App. 382, 385 (1922); *Lewis & Conger* v. *United States*, 13 Ct. Cust. App. 22, 23–24 (1925); *United States* v. *McConnaughey & Co.*, 13 Ct. Cust. App. 112, 118 (1925); *United States* v. *Macy & Co.*, 13 Ct. Cust. App. 245, 248–249 (1925); *Johnson & Co.* v. *United States*, 13 Ct. Cust. App. 373, 377 (1926).

as in fact, in order to avoid confusion, particularly among foreign governments with which the Board had frequently to deal. See H. Rept. 184, 69th Cong., 1st sess., pp. 1–4, and S. Rept. 781, 69th Cong., 1st sess., pp. 1–2, on H.R. 7966; see also 67 Cong. Rec. 4796–4797.

In 1929, in a *dictum* in *Ex parte Bakelite Corporation*, 279 U.S. 438, 457–458, this Court said of the Customs Court:

> Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. [Citing the Act of May 28, 1926, *supra*.] The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. [Footnote omitted.] But its functions, although mostly quasi-judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

In 1930, the Customs Court was "continue[d] as now constituted" by Section 518 of the Tariff Act of June 17, 1930, c. 497, 46 Stat. 590, 737. The same section changed the names of the court's members to "judges" (from "justices"), fixed their salaries at $10,000,* and provided that they should hold office during good behavior (thus terminating the President's power of removal, see *supra*, pp. 138–139). The 1930 Act also effected various other changes relating to the powers and procedure of the court. *E.g.*, §§ 501–502, 509–511, 514–519, 46 Stat. 730–731, 733–734, 734–739.

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*The amount then being received by district court judges. Judicial Code, § 2, as amended by the Act of December 13, 1926, c. 6, § 1, 44 Stat. (Part 2) 919 (28 U.S.C. (1934 ed.) 5).

In 1940, the provisions of the 1930 Tariff Act continuing the court as then constituted were transferred to the Judicial Code, as Section 187(a). Act of October 10, 1940, c. 843, § 1, 54 Stat. 1101.

In 1956, as pointed out *supra*, pp. 67–68, 72, the court was declared by Congress to be a court established under Article III of the Constitution. Act of July 14, 1956, c. 589, § 1, 70 Stat. 532, amending Section 251 of Title 28 of the United States Code.

The currently applicable provisions pertaining to the constitution, jurisdiction, and procedure of the court are contained in 28 U.S.C. 251–255, 1581–1583, 2631–2642.